Supreme Court, U.S.
FILED

021169 FEB 5 2003

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No.

In the Supreme Court of the United States

CITY OF LODI, CALIFORNIA

Petitioner,

v.

FIREMAN'S FUND INSURANCE CO., UNIGARD INSURANCE CO., AND UNIGARD SECURITY INSURANCE CO.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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248 pp

QUESTIONS PRESENTED

This is an action by several national liability insurance companies challenging the validity of a municipal ordinance enacted by the City of Lodi, California to address abatement of a serious environmental public nuisance within its borders. That ordinance, known as MERLO, is patterned after and serves the same purposes as the federal and state Superfund acts, CERCLA and the Carpenter-Presley-Tanner Hazardous Substance Account Act or HSAA, both of which contain savings clauses that explicitly preserve the ability of municipalities like Lodi to address local contaminated sites.

However, despite those savings clauses and despite the fact that CERCLA has not been invoked at the Lodi site by any of the limited number of parties authorized by Congress to do so, the Ninth Circuit held in a published opinion that several provisions of MERLO are preempted by CERCLA on a theory of "conflict" preemption (if, on remand, the District Court finds that Lodi would be a responsible party under CERCLA were there any direct liability claims under CERCLA § 106 or § 107 in connection with the Lodi site — which there are not and never have been) because, in the view of the Ninth Circuit panel, MERLO: while allowing Lodi to impose joint and several liability on responsible parties, somehow shields Lodi from contribution claims under federal or state law (it clearly cannot and does not); impermissibly allows Lodi to impose additional clean-up requirements over and above those required for consistency with the National Oil and Hazardous Substance Pollution Contingency Plan ("NCP"), 40 C.F.R., Part 300; and allows prevailing parties to recover their attorney's fees (as is expressly authorized by state law). As such, this petition presents the Court with these issues for review:

(1) Does the liability scheme set forth in CERCLA have any preemptive effect on state and local laws providing for the abatement of hazardous substance contamination at a site where CERCLA's liability provisions have not been invoked by a party authorized by Congress to do so?

(2) Is MERLO preempted by CERCLA and HSAA because it allows Lodi to impose joint and several liability?

(3) Is MERLO preempted by CERCLA because it allows Lodi to impose more stringent clean-up requirements than would be required by the United States acting under CERCLA?

(4) Is MERLO preempted by CERCLA because it allows prevailing parties to recover their attorney's fees?

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is the City of Lodi, a California municipality. Petitioner was the Appellee in the Ninth Circuit Court of Appeals and the Defendant in the District Court.

Respondents

Respondents are Fireman's Fund Insurance Company, a California corporation, Unigard Insurance Company and Unigard Security Insurance Company, Washington corporations doing business in California. Respondents were the Appellants in the Ninth Circuit Court of Appeals and the Plaintiffs in the District Court. Petitioner does not know whether any of the Respondents is a publicly traded corporation and, if so, whether any publicly held company owns 10% or more of its stock.

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The City of Lodi, California ("City" or "Lodi") respectfully petitions the Supreme Court for a writ of certiorari to review the Ninth Circuit Court of Appeal's published opinion in this case.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at *Fireman's Fund Insurance Co. v. City of Lodi, California,* 302 F.3d 928 (9th Cir. 2002). (*See* App. B at 6a.) The District Court's orders from which the appeals herein were taken are reported at *Fireman's Fund Insurance Co. v. City of Lodi, California,* 41 F. Supp. 2d 1100 (E.D. Cal. 1999) (*see* App. C at 64a) and *Unigard Insurance Co. v. City of Lodi, California,* 1999 WL 33454809 (E.D. Cal. 1999) (*see* App. D at 90a).

STATEMENT OF JURISDICTION

The Ninth Circuit modified its opinion and denied the parties' petitions for rehearing on October 8, 2002. (*See* App. A at 1a.) On January 2, 2003, this Court extended the time for Lodi to file a petition for a writ of certiorari to and including February 5, 2003. (*See* Application No. 02A540.) Accordingly, this petition is timely and this Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition calls upon the Court to interpret and apply the following statutory provisions:

(1) The Comprehensive Municipal Environmental Response & Liability Ordinance ("MERLO"), Lodi Municipal Code §§ 8.24.010-8.24.090. (*See* App. E at 107a.) Of particular relevance to this petition are the provisions of MERLO that authorize Lodi to impose joint and several liability on responsible parties (Lodi Mun. Code

§§ 8.24.040(E)), that authorize Lodi to impose more stringent clean-up requirements on responsible parties than would be required under other laws (Lodi Mun. Code § 8.24.0030(A)(5)), and that authorize prevailing parties to recover their attorneys' fees in proceedings brought pursuant to MERLO (Lodi Mun. Code §§ 8.24.010(2), 8.24.040(A)(9)(a), (c)(1), (F)).

(2) The Comprehensive Environmental Response, Compen-sation & Liability Act ("CERCLA" or the "Federal Superfund Act"), 42 U.S.C. §§ 9601-9675. (*See* App. E at 199a (excerpts only).) Of particular relevance to this petition are CERCLA's three savings clauses that preserve the ability of states and their political subdivisions to respond to contaminated sites. First, CERCLA § 114(a) states that "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." (42 U.S.C. § 9614(a).) Second, CERCLA § 302(d) states that "[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to release of hazardous substances or other pollutants or contaminants. . . ." (42 U.S.C. § 9652(d).) And third, CERCLA § 310(h) states that "[t]his chapter does not affect or otherwise impair the rights of any person under Federal, State, or common law. . . ." (42 U.S.C. § 9659(h).)

(3) The Carpenter-Presley-Tanner Hazardous Substance Account Act ("HSAA" or the "State Superfund Act"), California Health & Safety Code §§ 25300-25395.15. (*See* App. E at 204a (excerpts only).) Of particular relevance here is HSAA's savings clause, which provides that, with certain exceptions not applicable here, HSAA does not "affect or modify in any way the obligations or liabilities of any person under any other provision of state or federal law,

including common law. . . ." (Cal. Health & Safety Code § 25366(c).) Significantly, the phrase "state law" is used in HSAA to include municipal law: "'A release authorized or permitted pursuant to state law' means any release into the environment which is authorized by statute, ordinance, regulation, or rule of any state, regional, or local agency or government. . . ." (Cal. Health & Safety Code § 25326.)

STATEMENT OF THE CASE

A. Introduction

The Ninth Circuit's published opinion in this case marks the first time (to Lodi's knowledge) that this Court's decision in *Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597, 606-608 (1991) has been applied by a Circuit Court of Appeal to CERCLA. Unfortunately, the Ninth Circuit misapplied *Mortier* and effectively federalized remedial environmental law by applying CERCLA to a non-CERCLA site. The Court will recall that *Mortier* involved the issue of whether the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") preempted a municipal ordinance. (*Id.,* at 602.) This Court in *Mortier* began its analysis by noting that FIFRA expressly authorizes "State[s]" to regulate pesticides, but makes no reference in its savings clause to political subdivisions of states. (*Id.,* at 606-607.) This Court went on to find, however, that the term "State" is broad enough to encompass political subdivisions, and that the fact that FIFRA is silent with respect to the power of local governments "cannot suffice to establish a clear and manifest purpose to preempt local authority." (*Id.,* at 607 (internal quotes omitted).) "Indeed, the more plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities." (*Id.,* at 608.)

Here, the Ninth Circuit correctly found "that *Mortier's* reasoning regarding FIFRA is equally applicable to CERCLA. Like FIFRA, CERCLA anticipates that states will enact supplemental remedial environmental legislation. Moreover, like FIFRA, the CERCLA savings clauses refer only to 'State[s],' while CERCLA specifically refers to both states and political subdivisions in other provisions." (*Fireman's Fund Ins. Co. v. City of Lodi, California,* 302 F.3d 928, 942 (9th Cir. 2002).)

However, the Ninth Circuit failed to faithfully follow the reasoning of *Mortier* and instead limited the application of CERCLA's savings clauses to the doctrine of "field" preemption. That left the Ninth Circuit free to essentially ignore CERCLA's savings clauses during its "conflict" preemption analysis. (*See Fireman's Fund Ins. Co. v. City of Lodi, California,* 302 F.3d 928, 952, n.26 (9th Cir. 2002).) And that, in turn, may be why the Ninth Circuit applied CERCLA's liability scheme to the Lodi site even though CERCLA's liability scheme has not been invoked at the Lodi site. The Ninth Circuit, in essence, held that Lodi is barred from obtaining by municipal law any benefit (such as the ability to impose joint and several liability or to recover its attorneys' fees) that it would not be able to obtain under CERCLA even though CERCLA's liability scheme has not been triggered at this site by any of the limited number of parties authorized by Congress to do so. That in itself is an extraordinary departure from traditional preemption jurisprudence and over twenty years of jurisdictional jurisprudence under CERCLA. But what is worse is that the Ninth Circuit's decision is already being applied by the District Court in a related case to possibly preempt California state public nuisance law as well as MERLO. After all, if, as the Ninth Circuit held, CERCLA bars municipalities from obtaining benefits under ***municipal*** law that they would not be able to obtain under CERCLA, then why wouldn't CERCLA similarly bar municipalities (or anyone else) from obtaining

benefits under ***state*** law that they would not be able to obtain under CERCLA? The Ninth Circuit's decision has, therefore, left Lodi and other local governments throughout the nation with only one option for responding to environmental public nuisances — CERCLA's liability scheme. As such, its decision has, contrary to three express congressional commands, effectively preempted and federalized the entire field of hazardous substance site remediation (despite its holding to the contrary).

B. Factual Background

The City of Lodi is faced with, as the California Supreme Court put it, "an environmental public nuisance amounting to . . . a tremendous and serious groundwater contamination problem within Lodi's city limits." (*Connecticut Indemnity Co. v. Superior Court,* 23 Cal. 4th 807, 814 (2000) (internal quotes omitted).) That contamination, first detected in 1989, was caused by releases of toxic chemicals, principally tetrachloroethylene ("PCE" or "perc") and tricholoethylene ("TCE"), into the environment over many decades by dozens of dry cleaners and other businesses in Lodi. The contamination poses a serious and imminent threat to the public health, welfare, and the environment, especially given that Lodi's groundwater is its sole source of drinking water.

In 1996, Lodi entered into negotiations with the California Environmental Protection Agency's Department of Toxic Substances Control ("DTSC") to clarify the parties' mutual roles and responsibilities for responding to the contamination. Those negotiations culminated in 1997 when Lodi and the DTSC entered into a comprehensive joint cooperative agreement ("Cooperative Agreement"). In that Cooperative Agreement, Lodi settled its potential liability, if any, related to "leaks" from its sewers of hazardous substances that had been placed there by others. Also, Lodi

was designated the "lead enforcement entity" for the site and charged with the responsibility, in full cooperation and communication with DTSC, of diligently prosecuting appropriate environmental enforcement actions against responsible parties to compel their prompt and comprehensive investigation into, and clean-up of, the contamination.

Later that same year, 1997, the Lodi City Council enacted MERLO as required by the Cooperative Agreement. MERLO was designed to give Lodi the appropriate legal tools to properly discharge its responsibilities as the lead enforcement entity at the site. Basically, MERLO creates environmental investigatory tools and a remedial environmental response and liability scheme much like its federal and state counterparts, CERCLA and HSAA.[1]

C. Procedural History

In 1998, Fireman's Fund Insurance Company ("Fireman's Fund"), Unigard Insurance Company and Unigard Security Insurance Company (collectively, "Unigard"), insurers of various potentially responsible parties at the Lodi site, brought two separate actions challenging MERLO on a variety of grounds, including federal and state law preemption. The District Court ruled in favor of Lodi in both cases.

Fireman's Fund and Unigard (collectively, the "Insurers") then separately appealed those rulings to the Ninth Circuit Court of Appeals. After being consolidated and extensively briefed, the appeals were argued and submitted on

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[1] It should be noted that, in California, municipal ordinances are state law, albeit not "general laws" of the state, and a violation of them may be prosecuted by city authorities in the name of the "people of the State of California." (Cal. Gov. Code § 36900(a).)

April 7, 2000. Then, on October 30, 2001, in a published decision, the Ninth Circuit partially affirmed and partially reversed the District Court's rulings. (*See Fireman's Fund Ins. Co. v. City of Lodi, California,* 271 F.3d 911 (9th Cir. 2002).) In November 2001, the Insurers filed petitions for rehearing. On December 28, 2001, the Ninth Circuit requested that Lodi respond to the Insurers' petitions. Lodi did so on January 18, 2002. The Ninth Circuit then withdrew its opinion[2] on April 17, 2002, and issued a new published opinion on August 6, 2002. The parties again petitioned for rehearing. The Ninth Circuit denied those petitions and modified its published opinion for the final time on October 8, 2002.

Briefly, the Ninth Circuit held that MERLO is preempted in several respects by state and federal law under the doctrine of conflict preemption. Specifically, the Ninth Circuit held that, "[i]f the district court finds [on remand] that Lodi is a PRP [*i.e.,* a responsible party], MERLO is preempted [by CERCLA and HSAA] to the extent that it protects Lodi from contribution claims by other PRPs" and "to the extent that it legislatively insulates Lodi from bearing its share of responsibility by imposing joint and several liability on other PRPs." (*Fireman's Fund Ins. Co. v. City of Lodi, California,* 302 F.3d 928, 946-47 (9th Cir. 2002).) Likewise, "[i]f the district court finds that Lodi is indeed a PRP, it [also] may not legislate for itself a litigation advantage by granting itself the right to collect attorney's fees" that would not be available to it under CERCLA. (*Id.,* at 952-53.) Regardless of whether or not Lodi is found to be a PRP, the Ninth Circuit also held "that MERLO's provisions dealing with cleanup procedures are preempted by CERCLA . . . to the extent that they permit Lodi to order use of procedures

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[2] The Ninth Circuit had amended its opinion on January 8, 2002.

more stringent than the NCP." (*Id.*, at 951-52.) And, finally, the Ninth Circuit held that, "[b]ecause . . . the 'invalid provisions are easily severable from the remainder of the ordinance,' the balance of MERLO['s] . . . provisions . . . remain viable and are not preempted by either state or federal law. . . ." (*Id.*, at 957.)

REASONS FOR GRANTING THIS PETITION

The Ninth Circuit's published opinion decided nationally important questions of federal law in a way that conflicts with decisions of this Court, of other U.S. Courts of Appeal, and of the California Supreme Court.

Before addressing how the Ninth Circuit's decision conflicts with decisions of other federal and state courts and drastically curtails the traditionally-broad police power of municipalities to effectively respond to local environmental public nuisances that threaten the public health, welfare and the environment, it might be useful to briefly review the law of preemption as well as the three complimentary statutory schemes that deal with the clean-up of hazardous waste sites at the federal, state, and local level, and that are relevant to this petition, namely CERCLA, HSAA, and MERLO.

In response to the national outcry over the environmental disasters at Love Canal, the Chem-Dyne site and elsewhere, Congress enacted CERCLA in 1980 "to provide a mechanism for the prompt and efficient cleanup of hazardous waste sites." (*See United States v. City of Denver,* 100 F.3d 1509, 1511 (10th Cir. 1996) .) CERCLA's two overriding objectives are to facilitate the timely cleanup of hazardous waste sites and to make polluters pay for the necessary remedial costs to address the conditions that they caused. (*Stanton Road Assoc. v. Lohrey Enterprises,* 984

F.2d 1015, 1019 (9th Cir. 1993).) In enacting CERCLA, Congress designed the statute to serve as an umbrella of response, compensation and liability authorities that federal, state, and local governments (and, to some extent, private parties) could utilize to address environmental contamination. The text of CERCLA makes clear that Congress envisioned a partnership between various levels of government in addressing the complex and costly problems associated with hazardous waste remediation, and that Congress anticipated that states would enact supplemental environmental remedial legislation. (*See* CERCLA §§ 114(a), 302(d), 310(h), 42 U.S.C. §§ 9614(a), 9652(d), 9659(h).) As such, it has been correctly held that "CERCLA sets a floor, not a ceiling, for environmental protection." (*United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1454 (6th Cir. 1991).)

HSAA, which is commonly referred to in California as the "State Superfund Act," mirrors CERCLA in many respects. (*Acme Fill Corp. v. Althin CD Med., Inc.*, 1995 WL 822665 at *5 (N.D. Cal. 1995).) Like CERCLA, HSAA "imposes cleanup obligations and provides private cost recovery rights substantially identical to those obligations imposed and rights granted under CERCLA." (Donna R. Black, *Potential Environmental Liabilities in Corporate Acquisitions,* 894 PLI/Corp 543, 546 (June-July 1995).) HSAA also relies on CERCLA's definition of PRPs. (Bruce P. Howard, *et al., CERCLA and Similar State Laws: Overview and Recent Developments,* 832 PLI/Corp 531, 551 (Dec.-Jan. 1993).) However, HSAA differs from CERCLA in that "HSAA liability may be apportioned according to fault,"[3] whereas liability under CERCLA may be joint and

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[3] It should be noted, however, that, under California public nuisance law, liability for indivisible harms is joint and several. (*See e.g., Lincoln Properties, Ltd. v. Higgins,* 1993 WL 217429, at *25 (E.D. Cal. 1993); *Tint v. Sanborn,* 211 Cal. App. 3d 1225,

several where warranted. (*Id.*)

MERLO is modeled on both CERCLA and HSAA, and was, as previously noted, enacted by the Lodi City Council with the full cooperation and encouragement of the DTSC. MERLO incorporates many of the standards employed by CERCLA and HSAA. For example, MERLO uses a similar definition of who is considered a liable or "responsible party" as that used by CERCLA and HSAA (*see* Lodi Mun. Code § 8.24.040(A)(1)), and, like CERCLA, the scope of liability under MERLO is joint and several (*see* Lodi Mun. Code § 8.24.040(F)). Lodi enacted MERLO to assist the City of Lodi—the governmental entity most familiar with and intimately connected to the site—in responding to the contamination in order to protect the public health, welfare and the environment.

In sum, CERCLA, HSAA, and MERLO are complimentary statutory schemes that work together to authorize their respective levels of government to obtain appropriate injunctive relief and cost recovery in responding to environmental contamination. CERCLA's primary concern is the expenditure and recovery of ***federal*** funds expended to respond to environmental concerns arising from hazardous substance sites. HSAA's concern is the proper expenditure and recovery of ***state*** funds expended to respond to hazardous substances released into the environment. And, MERLO's concern is the proper expenditure and recovery of ***municipal*** funds expended to respond to environmental public nuisances.

With those three complimentary statutory schemes in mind, the discussion can now turn to the general principles applicable to preemption claims. As to preemption by federal

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1227-34 (1989); *City of Merced v. Fields*, 997 F. Supp. 1326, 1332-33, 1335-37 (E.D. Cal. 1998).)

law, under the Supremacy Clause of the United States Constitution, state or local laws that "interfere with, or are contrary to the laws of Congress" are preempted and are therefore invalid. (*Gibbons v. Ogden,* 22 U.S. (9 Wheat) 1, 211, 6 L. Ed. 23 (1824).) "Congressional intent governs [the] determination of whether federal law preempts state law. If Congress so intends, '[p]re-emption . . . is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." (*Boyes v. Shell Oil Prods. Co.,* 199 F.3d 1260, 1267 (11th Cir. 2000), *quoting Gade v. National Solid Wastes Management Association,* 505 U.S. 88, 96 (1992) (plurality).) (*Fireman's Fund Ins. Co. v. City of Lodi, California,* 302 F.3d 928, 941 (9th Cir. 2002).)

This Court has recognized three types of federal preemption: express preemption, where the statute contains "explicit pre-emptive language"; field preemption, "where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it"; and conflict preemption, "where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Gade v. National Solid Wastes Management Association,* 505 U.S. 88, 96 (1992) (plurality).) "Although these categories provide a useful analytic framework, they are not 'rigidly distinct.'" (*Industrial Truck Association v. Henry,* 125 F.3d 1305, 1309 (9th Cir. 1997).)

"When considering [preemption], '[courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (*Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. 597, 604 (1991), *quoting Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230

(1947).) Moreover, courts are "highly deferential" to local legislation in areas such as environmental regulation, which "traditionally has been a matter of state authority." (*Exxon Mobil Corp. v. United States Environmental Protection Agency,* 217 F.3d 1246, 1255 (9th Cir. 2000).) Finally, for "purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed the same way as that of statewide laws." (*Hillsborough County v. Automated Med. Labs., Inc.,* 471 U.S. 707, 713 (1985) (internal citations omitted).)

As to preemption of local laws by state law, California's preemption doctrine is based on Article 11, § 7 of the California Constitution, which states that "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., Art. 11, § 7; *Sherwin-Williams Co. v. City of Los Angeles,* 4 Cal. 4th 893, 897 (1993).) The California Supreme Court has held that State law is "in conflict with," or preempts, local law if the local law "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." (*Sherwin-Williams,* 4 Cal. 4th at 897.) As the court explained:

> Local legislation is "duplicative" of general law when it is coextensive therewith. Similarly, local legislation is "contradictory" to general law when it is inimical thereto. Finally, local legislation enters an area that is "fully occupied" by general law when the Legislature has expressly manifested its intent to "fully occupy" the area, or when it has impliedly done so. . . .

(*Id.* at 897-98 (internal quotations and citations omitted).) Thus, with the exception of the concept of preemption by duplication which has no federal analogue, California's

preemption law is substantially similar to federal preemption law.

With this general background on the applicable law in mind, the discussion can now turn to the substance of the Ninth Circuit's decision, where the Ninth Circuit went so very wrong in its analysis, and why this Court's review of that decision is so very important to the City of Lodi and to other municipalities throughout the country.

A. The Ninth Circuit effectively federalized remedial environmental law at all hazardous substance contamination sites across the nation by applying CERCLA's liability scheme to a site where CERCLA has not been triggered by a party authorized by Congress to do so.

Initially, it is crucial for this Court to understand that the Ninth Circuit effectively federalized remedial environmental law at hazardous substance contamination sites across the nation by applying CERCLA's liability scheme to a site where CERCLA's liability scheme has ***not*** been invoked by any of the limited number of governmental or non-liable private parties authorized by Congress to invoke it. Although CERCLA authorizes a limited number of different persons to undertake a number of different actions to address releases or threatened releases of hazardous substances into the environment by facilities, ***none*** of those actions have been undertaken here in connection with the Lodi site:

- Although many years ago the U.S. Environmental Protection Agency elected to conduct some very limited sampling and file review at and in connection with the Lodi site, it elected ***not*** to propose listing the site on the National Priorities List ("NPL") and has

not commenced any further removal or remedial actions at the Lodi site pursuant to CERCLA § 104(a), 42 U.S.C. § 9604(a), nor has it commenced any action to recover any of the very limited response costs it incurred at the Lodi site pursuant to CERCLA § 107(a), 42 U.S.C. § 9607(a), or any other statute or regulation.

- The federal government is ***not*** using its information gathering authority to investigate or monitor the contamination at the Lodi site pursuant to CERCLA § 104(b) or (e), 42 U.S.C. § 9604(b), (e).

- The federal government has ***not*** listed the Lodi site on the NPL established pursuant to CERCLA § 105(a)(8)(B), 42 U.S.C. § 9605(a)(8)(B).

- No one has made a claim, valid or otherwise, against the federal Superfund for reimbursement of response costs incurred at the Lodi site pursuant to CERCLA § 112(a), 42 U.S.C. § 9612(a).

- No authorized agency of the United States has issued an administrative abatement action order against any responsible parties at the Lodi site pursuant to CERCLA § 106(a), 42 U.S.C. § 9606(a).

- The federal government has ***not*** brought a civil action against any responsible parties seeking injunctive relief with respect to the Lodi site pursuant to CERCLA § 106(a), 42 U.S.C. § 9606(a).

- Neither the federal government, the State of California, nor any Indian tribe has brought a civil action against any responsible parties to recover response costs or natural resource damages incurred at the Lodi site pursuant to CERCLA § 107(a), 42

U.S.C. § 9607(a). In fact, the State covenanted not to pursue such CERCLA claims against Lodi in the Cooperative Agreement.

- The City of Lodi has ***not*** brought a civil action against any responsible parties to recover its response costs incurred at the Lodi site pursuant to any provision of CERCLA, including CERCLA § 107(a), 42 U.S.C. § 9607(a).[4] Also, Lodi covenanted not to pursue such CERCLA claims against the State in the Cooperative Agreement.

- No innocent private party has brought a civil action against any responsible parties to recover its response costs incurred at the Lodi site pursuant to CERCLA § 107(a), 42 U.S.C. § 9607(a).

- The federal government has ***not*** entered into a consent decree or any other settlement with any responsible parties to perform any response actions at the Lodi site pursuant to CERCLA § 122, 42 U.S.C. § 9622.

- No person has brought a citizen suit against "any person . . . who is alleged to be in violation of any standard, regulation, condition, requirement, or order" promulgated under CERCLA in connection with the Lodi site pursuant to CERCLA § 310(a), 42 U.S.C. § 9659(a).

Put simply, no governmental agency, federal, state, local, or that of an Indian tribe, is enforcing CERCLA's provisions at the Lodi site, nor have the Insurers identified any provision of

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[4] It should be noted that the case law is unclear as to whether Lodi, if it were a responsible party, could maintain such an action under CERCLA.

CERCLA with which they must comply pursuant to any order or request of any such agency. (*See Fireman's Fund Ins. Co. v. City of Lodi, California,* 41 F. Supp. 2d 1100, 1111-12 (E.D. Cal. 1999).) With that in mind, the discussion can now turn to the four aspects of MERLO that the Ninth Circuit held conflicted with, and thus were preempted by, either or both CERCLA or HSAA.

B. MERLO does not "protect Lodi from contribution claims" and thus does not conflict with, and is not preempted by, HSAA or CERCLA on that basis.

First, the Ninth Circuit apparently agreed with the Insurers' inaccurate assertion that, "under MERLO, Lodi cannot be sued for contribution" since it held that, if Lodi is a responsible party, "MERLO is preempted to the extent that it protects Lodi from contribution claims":

> If the district court finds that Lodi is a PRP, MERLO is preempted to the extent that it protects Lodi from contribution claims by other PRPs. CERCLA permits a PRP who incurs response costs to bring suit to recover those costs from any other PRP. Thus, in theory, Fireman's Fund's or Unigard's insured could remediate the Lodi site and then sue the City pursuant to CERCLA § 113(f) or HSAA § 25356(e) for contribution in the amount of Lodi's fair share of the costs. If Lodi is indeed a PRP, it cannot simply legislate away this potential contribution liability under state and federal law. For these reasons, we find that MERLO is preempted to the extent that it legislatively insulates Lodi from contribution liability under state and federal law.

(*Fireman's Fund Ins. Co. v. City of Lodi, California,* 302 F.3d 928, 946 (9th Cir. 2002) (footnotes omitted).)

The panel's holding is entirely premised on the mistaken assumption that Lodi is not subject to contribution claims by parties held liable pursuant to MERLO. Lodi *is* and always has been subject to such claims under applicable federal and state law, and MERLO, as local legislation, does not and cannot shield Lodi from such claims.

First, despite Lodi's "broad municipal authority to address local environmental nuisances" (*see Fireman's Fund,* 302 F.3d at 942, *citing* Cal. Const., Art. 11, § 7, Cal. Gov. Code §§ 38771, 38773), in California, it is generally the province of the Legislature to create private rights of action; other levels of government in California generally do not possess that power unless expressly conferred upon them by the Legislature.[5] And no such power has been expressly conferred in regard to private rights of action for contribution. Indeed, the State of California fully occupies the field of contribution and has a well-developed system of statutory and common law rules related to contribution. That is why (to Lodi's knowledge) there are no locally-created rights to contribution created by local law in the absence of express legislative authorization in California. Put simply, the Lodi City Council, in enacting MERLO, chose not to include in it

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[5] Under California law, a violation of a municipal ordinance can, of course, serve as the basis of a negligence *per se* claim or a nuisance *per se* claim. (*See e.g., Figone v. Guisti,* 43 Cal. App. 606, 609 (1919) (negligence *per se*); *Scott v. City of Del Mar,* 58 Cal. App. 4th 1296, 1305-1306 (1997); Cal. Gov. Code §§ 38771-38775.) Moreover, under appropriate circumstances, California law allows a private right of action to be judicially implied from local legislation that does not expressly create a private right of action. (*See* 1 *California Jurisprudence 3d: Actions* § 52.)

any contribution provisions creating for private parties causes of action against other private parties because it had reservations about its very authority to do so. However, by not enacting a private cause of action for contribution in MERLO, Lodi never held itself out as even conceivably having the authority to opt out of California's generally-applicable statutory and common law rules of contribution.

In fact, it has always been Lodi's position that any party subjected to joint and several liability under MERLO may maintain an action in contribution to apportion that liability among other jointly and severally liable parties, ***including Lodi,*** pursuant to any applicable federal or state law contribution authorities.[6]

In sum, even if Lodi had the power to opt out of otherwise applicable rules of contribution (and it does not!), it has not sought, in MERLO, to do so. Indeed, nothing in MERLO purports to protect Lodi from contribution claims or to insulate Lodi from contribution liability, and Lodi has ***never*** taken the position that it does. On the contrary, Lodi has repeatedly acknowledged in this and other related cases in both federal and state court that parties held liable under MERLO remain free to assert contribution claims against others pursuant to any applicable federal or state law.

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[6] It is an open question whether liable defendants can use CERCLA § 113(f) contribution claims to apportion their ***non***-CERCLA joint and several liability. (*See Aviall Services, Inc. v. Cooper Industries, Inc.*, 312 F.3d 677 (5th Cir. 2002).) But assuming they can, MERLO does nothing to interfere with that — a party held jointly and severally liable pursuant to MERLO would simply have such liability equitably apportioned among other such jointly and severally liable parties pursuant to CERCLA § 113(f).

Indeed, all of California's generally-applicable statutory and common law rules regarding contribution (*see e.g.*, Cal. Civ. Code § 1432; Cal. Civ. Proc. Code §§ 877, 877.6, 881, 882)[7] remain wholly unaffected by MERLO. For instance, anyone held liable under MERLO has the right to assert contribution claims against anyone they wish, including Lodi, pursuant to California Civil Code § 1432, which provides, "a party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him." MERLO cannot and does ***not*** abrogate or impair this or any other right to contribution that is or may be available to parties held liable pursuant to MERLO.

C. MERLO does not conflict with, and thus is not preempted by, CERCLA because CERCLA allows states and, where authorized by state law, their political subdivisions to impose joint and several liability.

Next, the Ninth Circuit held that the provision of MERLO that allows Lodi to impose joint and several liability on responsible parties (Lodi Mun. Code § 8.24.040(E)) conflicts with, and thus is preempted by, CERCLA if, on remand, the District Court determines that Lodi would be a responsible party under CERCLA:

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[7] Some of these statutes (Cal. Civ. Proc. Code §§ 877, 877.6) apply by their terms to tort actions involving joint tortfeasors. However, they have also been applied by state courts, by analogy, to statutory public nuisance actions involving jointly responsible parties. (*See e.g., Arbuthnot v. Relocation Realty Service Corp.*, 227 Cal. App. 3d 682 (1991).)

> Our circuit has held that a PRP may not bring a CERCLA § 107 cost recovery action, and instead may bring only a claim for contribution under CERCLA § 113(f). This means that a PRP does not have a claim for the recovery of the totality of its cleanup costs against other PRPs, and a PRP cannot assert a claim against other PRPs for joint and several liability. In support of our decision in *Pinal Creek,* we noted that allowing a party responsible for part of the contamination to impose joint and several liability on other PRPs would result in unfair cost shifting and guarantee inefficiency, potential duplication, and prolongation of the litigation process in a CERCLA case. We have not recognized any exception to *Pinal Creek* for municipal PRPs and we decline to do so now.
>
> Thus, if the district court determines that Lodi is a PRP, Lodi may not escape its share of responsibility by imposing all of the costs of cleanup on others. Allowing it to do so would interfere with CERCLA's PRP cost allocation scheme, and would implicate the same policy concerns relied upon by this court in *Pinal Creek* in rejecting a § 107 cost recovery action for PRPs. For these reasons, we find that MERLO is preempted to the extent that it legislatively insulates Lodi from bearing its share of responsibility by imposing joint and several liability on other PRPs.

(*Fireman's Fund Ins. Co. v. City of Lodi, California,* 302 F.3d 928, 946-47 (citations omitted).)

This holding by the Ninth Circuit is again premised on the same mistaken assumption — that MERLO somehow shifts Lodi's alleged liability, if any, onto others. It does not and cannot do that.

Moreover, it is clear from the passage quoted above that the Ninth Circuit felt constrained to choose between, on the one hand, a system of pure joint and several liability (in which the plaintiff can fully "escape its share of responsibility by imposing all of the costs of cleanup on others") and, on the other hand, a system of pure several liability (in which all of the responsible parties, including the plaintiff, are only liable for their fair share of the cleanup costs). Those two liability systems may be the only choices available to a court in its interpretation of CERCLA § 107 and § 113(f) given CERCLA's structure, text and legislative history, and given the current development of ***federal*** common law. (*See e.g., Fireman's Fund, supra,* 302 F.3d at 946-47; *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301-1303 (9th Cir. 1997).) However, those are certainly not the only choices available to a court in its interpretation of ***state*** and ***municipal*** laws.

For instance, California, like many states, has judicially adopted a "pure" comparative responsibility system (*see Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 823 (1975)) in which responsible parties can be held jointly and severally liable for an entire indivisible harm ***reduced by the plaintiff's share of responsibility.*** (*See e.g., American Motorcycle Association v. Superior Court,* 20 Cal. 3d 578, 586-90 (1978); *see* Cal. Civ. Code § 1431 ("An obligation imposed upon several persons . . . is presumed to be joint, and not several. . . .").)[8] Jointly and severally liable parties who

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[8] Such joint and several liability extends only to economic damages; liability is several, not joint, for non-economic damages.

satisfy more than their fair share of responsibility can obtain contribution from other responsible parties ***including the plaintiff.*** (Cal. Civ. Code § 1432.) Moreover, courts in California retain broad equitable authority to reallocate "orphan shares" (*i.e.*, the liability of other parties who are insolvent, judgment-proof, immune from liability or simply not before the court) among all of the responsible parties ***including the plaintiff.*** (*See e.g., Restatement (Third) Torts: Apportionment of Liability,* § C21(a) ("[I]f a defendant establishes that a judgment for contribution cannot be collected fully from another defendant, the court reallocates the uncollectible portion of the damages to all other parties, ***including the plaintiff,*** in proportion to the percentages of comparative responsibility assigned to the other parties.") (emphasis added).)

MERLO does ***not*** purport to abrogate, impair or alter California's comparative responsibility system, and Lodi has ***never*** argued that it does. MERLO does not and cannot "legislatively insulate Lodi from bearing its share of responsibility" or allow Lodi to "escape its share of responsibility by imposing all of the costs of cleanup on others." Rather, it simply follows California's generally-applicable comparative responsibility system. Thus, the type of liability that attaches under MERLO is the same as, for example, the type of liability that would attach under California public nuisance abatement law. (*See e.g., Lincoln Properties, Ltd. v. Higgins,* 1993 WL 217429, at *25 (E.D. Cal. 1993) (holding dry-cleaning-tenant-defendants jointly and severally liable pursuant to California public nuisance law despite also holding landlord-plaintiff liable); *Tint v. Sanborn,* 211 Cal. App. 3d 1225, 1227-34 (1989) (holding that California's comparative responsibility system applies to nuisance actions); *City of Merced v. Fields,* 997 F. Supp.

(Cal. Civ. Code § 1431.2.)

1326, 1332-33, 1335-37 (E.D. Cal. 1998) (holding that liable municipality is limited to contribution claims under CERCLA, but can assert joint and several liability claims under California public nuisance law).)

It would be one thing if the Ninth Circuit's decision were expressly limited to municipal ordinances like MERLO; if it were, liable municipalities could simply bring joint and several liability claims pursuant to state law, instead of local law. Unfortunately, the Ninth Circuit's decision is not expressly limited to local law. In fact, the District Court has already interpreted it in a related case (*People of the State of California and City of Lodi v. M&P Investments, et al.*, No. CIV. S-00-2441-FCD-JFM (E.D. Cal.)) as compelling the conclusion that, if Lodi is held to be a responsible party on remand, then it can only maintain several (not joint and several) claims pursuant, ***not to MERLO***, but to California's long-standing public nuisance abatement law. In other words, the Ninth Circuit's decision is being interpreted by the District Court as having entirely wiped out California's comparative responsibility system as it applies in environmental contamination cases involving liable plaintiffs in favor of CERCLA § 113(f)'s pure several liability system.[9] Put simply, when a plaintiff, even a state or municipality, is alleged to be a liable party, at a hazardous substance contamination site, any other liability system conflicts with, and thus is preempted by, CERCLA's pure several liability system. As such, the allegedly liable plaintiff is limited to bringing contribution claims to impose several (not joint and

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[9] There does not appear to be any reason why the impact of the Ninth Circuit's decision would stop at California's borders. The decision would appear to wipe out the liability systems in all of the thirteen states within the Ninth Circuit as they apply to environmental contamination cases involving liable plaintiffs in favor of CERCLA's pure several liability system.

several) liability ***regardless of whether the liability being asserted arises under CERCLA, MERLO, or any other state or municipal law.***

D. MERLO does not conflict with, and thus is not preempted by, CERCLA because CERCLA allows states and, where authorized by state law, their political subdivisions to impose environmental clean-up requirements and procedures that are more stringent than those that would be required under CERCLA.

Next, the Ninth Circuit also held that "[t]o the extent that MERLO § 8.24.030(A)(5) permits Lodi to order abatement that is more stringent than the NCP, we find that it is preempted for the same reasons that MERLO's burden of proof [on the "divisibility of harm" affirmative defense] is preempted." (*Fireman's Fund Ins. Co. v. City of Lodi, California,* 302 F.3d 928, 951 (9th Cir. 2002).) As to MERLO's burden of proof on the "divisibility of harm" affirmative defense, MERLO § 8.24.040(E) requires a liable defendant attempting to avoid the imposition of joint and several liability to demonstrate by clear and convincing evidence that the harm is divisible in order to apportion the harm for which it can be held liable, whereas CERCLA only requires such proof be made by a preponderance of evidence. The Ninth Circuit held that this provision of MERLO is preempted for the following reasons:

> Potential purchasers of abandoned or underutilized contaminated properties are often deterred from purchasing and cleaning up these properties by exposure to unbounded and uncertain liability. Many initiatives have been instituted by California and the federal government to expedite the cleanup of these

> "Brownfields" and . . . [s]uch [c]leanups . . . have come to achieve some level of predictability, thus allowing for a reasonable estimate of exposure to liability and of the costs involved in taking on a cleanup. Such certainty, to the extent it is available, greatly encourages prospective purchasers to rehabilitate contaminated property and put it back into productive use. . . . [¶] [If we were] [t]o allow literally thousands of different local governments to impose their own liability schemes (such as Lodi's) that [are more onerous than CERCLA's] . . . the risk of overly strict and uncertain liability would thereby be compounded, thwarting CERCLA's goals. [¶] On the other hand, municipal liability schemes equal to or less onerous than that imposed by CERCLA do not foster uncertainty or discourage cleanup but could, in many instances, make rehabilitation of contaminated property more feasible, thus furthering the objective of Congress.

(*Fireman's Fund, supra,* 302 F.3d at 948-49 (citations omitted).)

The Ninth Circuit's holding that Lodi can require clean-up procedures that are less stringent, but not more stringent, than the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 C.F.R. Part 300,[10]

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[10] Under CERCLA, the cleanup of ***listed*** hazardous waste sites must be consistent with the NCP. The NCP is a plan promulgated by the U.S. Environmental Protection Agency that "specifies the roles" of the federal, state, and local governments "in responding to hazardous waste sites, and establishes the procedures

is clearly erroneous, and presents another issue of exceptional national importance. While the desire to "achieve some level of predictability, thus allowing for a reasonable estimate of exposure to liability and of the costs involved in taking on a cleanup" is laudable, that was not Congress' intent in enacting CERCLA. Rather, Congress clearly intended CERCLA to be an ***optional*** set of supplementary environmental response, compensation and liability authorities that do not require anyone (except perhaps the U.S. Environmental Protection Agency in certain circumstances where it chooses to act) to do anything unless and until those authorities are properly invoked by a governmental entity or private party expressly authorized by Congress to do so. Absent such invocation, CERCLA neither sets a floor nor a ceiling for environmental protection.

That fact is ***unmistakable*** given CERCLA's multiple savings clauses. For example, CERCLA § 302(d) states that "[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to release of hazardous substances or other pollutants or contaminants. . . ." (42 U.S.C. § 9652(d).) Similarly, CERCLA § 310(h) states that "[t]his chapter does not affect or otherwise impair the rights of any person under federal, State, or common law, except with respect to the timing of review as provided in section 9613(h)," a CERCLA provision that is not at issue here. (42 U.S.C. § 9659(h).)

It is only when CERCLA's response or liability scheme is properly invoked that CERCLA becomes applicable and acts to set a floor, not a ceiling, for environmental

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for making cleanup decisions." (*Fireman's Fund Ins. Co. v. City of Lodi,* 302 F.3d 928, 949 (9th Cir. 2002), *citing United States v. Denver,* 100 F.3d 1509, 1511 (10th Cir. 1996).)

protection. (*See e.g., United States v. Azco Coatings of America, Inc.*, 949 F.2d 1409, 1454 (6th Cir. 1991) ("CERCLA sets a floor, not a ceiling, for environmental protection.").) That fact is made clear by the third of CERCLA's savings clauses, CERCLA § 114(a), which provides that "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any ***additional*** liability or requirements with respect to the release of hazardous substances within such State." (42 U.S.C. § 9614(a) (emphasis added).) That fact is emphasized throughout CERCLA including, for example, CERCLA § 121(d)(2), which allows for the use of "more stringent" State laws to govern clean-up requirements under CERCLA. (42 U.S.C. § 9621(d).)

In fact, the NCP itself also makes perfectly clear that a State's or municipality's "applicable or relevant and appropriate" clean-up requirements (commonly referred to as "ARARs") may be required under CERCLA if they ***more stringent*** than the federal requirements. (40 C.F.R. §§ 300.5 ("Only those state standards that are . . . ***more stringent*** than federal requirements may be applicable" or "relevant and appropriate.") (emphasis added); 300.400(g) (same); *see also* 40 C.F.R. §§ 300.700(c)(5)(iii) ("applicable requirements of federal or state law may not be waived by a private party"), 300.700(c)(5)(vi) ("private party removal actions must always comply with the requirements of applicable law"), 300.180(d) (encouraging states "to use their authorities to compel potentially responsible parties to undertake response actions").)

E. MERLO does not conflict with, and thus is not preempted by, CERCLA because CERCLA allows prevailing parties to recover their attorney's fees in proceedings brought pursuant to other federal, state or local laws like MERLO.

Finally, the Ninth Circuit also held, without citing to ***any*** authority whatsoever, that the provision of MERLO that authorizes prevailing parties to recover their attorney's fees (Lodi Mun. Code § 8.24.040(F); *see also* Lodi Mun. Code §§ 8.24.010(2), 8.24.040(A)(9)(a), (c)(1)), conflicts with, and thus is preempted by, CERCLA:

> We need not decide if a city is the "State" for purposes of recovering its attorney fees under CERCLA, because, in any case, a city that is also a PRP should not be able to avail itself of this litigation advantage. If the district court finds that Lodi is indeed a PRP, it may not legislate for itself a litigation advantage by granting itself the right to collect attorney's fees.

(*Fireman's Fund Ins. Co. v. City of Lodi,* 302 F.3d 928, 953 (9th Cir. 2002).)

However, it remains an open question whether a municipality such as Lodi would be entitled to recover attorney's fees under CERCLA. In *Key Tronic Corp. v. United States,* 511 U.S. 809 (1994), this Court held that CERCLA § 107(a)(4) does not permit a "private party" to recover her attorney's fees. (*Key Tronic,* 511 U.S. at 817-19.) However, in *United States v. Chapman,* 146 F.3d 1166 (9th Cir. 1998), the Ninth Circuit held that CERCLA § 107(a)(4) permits "the government" to recover its attorney's fees. (*Chapman,* 146 F.3d at 1175-76.) In *Fireman's Fund,*

however, the Ninth Circuit declined to reach the question of whether a municipality is a "private party" or the "State" (*i.e.*, the government) for purposes of CERCLA § 107(a)(4). (*Fireman's Fund,* 302 F.3d at 953.) Without resolving that question, the basis for its ruling that MERLO ***conflicts*** with CERCLA is something of a mystery.

In any event, regardless of whether Lodi would be barred from recovering its attorney's fees ***in an action under CERCLA,*** in the context of this case, CERCLA certainly does not preempt Lodi's authority pursuant to state law to recover its attorney's fees ***in an action under a municipal ordinance such as MERLO.***[11] As noted previously, CERCLA has ***not*** been triggered at the Lodi site. No one authorized to invoke CERCLA's response, compensation or liability schemes at the Lodi site has done so. There are no orders or requests from any federal or state agency pursuant to CERCLA with which the Insurers or, for that matter, any of the parties at the Lodi site, are required to comply. As such, the only way in which any of the provisions of MERLO discussed above could

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[11] California law expressly authorizes municipalities to, by ordinance, "declare what constitutes a nuisance" (Cal. Gov. Code § 38771), "establish a procedure for the abatement of a nuisance" (Cal. Gov. Code § 38773.5(a)), and "provide for the recovery of attorneys' fees in any action, administrative proceeding, or special proceeding to abate a nuisance" (Cal. Gov. Code § 38773.5(b)). "If the ordinance provides for the recovery of attorneys' fees, it shall provide for recovery of attorneys' fees by the prevailing party, rather than limiting recovery of attorneys' fees to the city if it prevails." (*Id.*) But in no event "shall an award of attorneys' fees to a prevailing party exceed the amount of reasonable attorneys' fees incurred by the city. . . ." (*Id.*) The California Legislature has thus clearly defined who can recover, how much they can recover, and under what circumstances they can recover their attorneys' fees in proceedings involving municipal ordinances like MERLO.

"conflict" with CERCLA is if they "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Gade v. National Solid Wastes Management Association,* 505 U.S. 88, 96 (1992) (plurality).) Unfortunately, the Ninth Circuit lost sight of that and chose instead to strictly apply CERCLA to the Lodi site as if it were a site subject to CERCLA's liability scheme.

CONCLUSION

For the reasons set forth above, the City of Lodi, California respectfully requests that this Court grant its petition for writ of certiorari.

Respectfully submitted,

February 5, 2003

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed August 6, 2002]
[Amended October 8, 2002]

Nos. 99-15614, 99-15802
Nos. CV. 98-1489 FCD-JFM, CV. 98-1712 FCD-JFM

Fireman's Fund Insurance Co.,

Plaintiff-Appellant,

v.

CITY OF LODI, CALIFORNIA,

Defendant-Appellee.

UNIGARD INSURANCE COMPANY, ET AL.,

Plaintiffs-Appellants,

v.

CITY OF LODI,

Defendant-Appellee.

Order Denying Petitions for Rehearing,
Filed 8/06/02, Amended 10/08/02

Before: PREGERSON, D.W. NELSON, Circuit Judges and MOSKOWITZ, District Judge.[1]

PREGERSON, Circuit Judge.

ORDER DENYING PETITIONS FOR PANEL REHEARING / REHEARING EN BANC, GRANTING REQUEST FOR JUDICIAL NOTICE, AND AMENDING OPINION

The panel has voted unanimously to deny the petitions for rehearing filed August 20, 2002, by Fireman's Fund, August 23, 2002, by Unigard, and August 26, 2002, by Lodi. Judge Pregerson has voted to deny the petitions for rehearing en banc filed by the same parties on the dates listed above. Judge Nelson and Judge Moskowitz recommend denying the petitions for rehearing en banc. The petitions for rehearing en banc were circulated to the full court and no judge requested a vote on the petitions.

Lodi's motion for judicial notice in support of its petition for rehearing is GRANTED. The petitions for rehearing and rehearing en banc are DENIED. The parties shall not file any further petitions for rehearing and rehearing en banc.

This court's opinion filed on August 6, 2002 and

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[1] The Honorable Barry Ted Moskowitz, United States District Judge for the Southern District of California, sitting by designation.

reported at 2002 WL 1792612 is hereby amended as follows:

At page *17, append a new footnote 26 as follows after sentence "We hold, therefore, that MERLO's provisions dealing with cleanup procedures are preempted by CERCLA only to the extent that they permit Lodi to order use of procedures more stringent than the NCP":

> Lodi argues that MERLO's provisions allowing it to order abatement procedures more stringent than the NCP can not be preempted by CERCLA because of CERCLA's multiple savings clauses. Lodi's argument does not recognize the difference between field preemption and conflict preemption. We have indeed held that CERCLA's savings clauses make it clear that CERCLA does not preempt the *field* of hazardous waste cleanup. *See* Section III(B)(1) *supra*. As this opinion makes it clear, municipalities such as Lodi may exercise significant powers of self-protection in regulating hazardous waste cleanup. However, the powers of municipalities are not unlimited. Where municipal legislation comes into conflict with CERCLA, we find the municipal legislation to be preempted, just as other circuits have found conflict preemption in other circumstances, notwithstanding the same savings clauses cited by Lodi. *See, e.g.*, *Bedford Affiliates*, 156 F.3d at 426-7 (holding application iof certain State law remedies was

preempted by CERCLA and reasoning that CERCLA "does not expressly preempt state law" but where State or local laws "Stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress," it is preempted); *Reading*, 115 F.3d at 1117 (holding that CERCLA preempted application of certain contribution and restitution remedies "because the state law remedies obstruct the intent of Congress...[by thwarting] the efficient resolution of environmental disputes"); *Sherwin-Williams*, 151 F.3d at 618 (holding that the purpose of CERCLA's savings clause is "merely to nix an inference that the statute in which [they] appear[] is intended to be the exclusive remedy for harms caused by violation of the statute, " and holding application of certain provisions of State law preempted by CERCLA).

Lodi also points out that the NCP alludes to standards that are more stringent than federal requirements. First, the context in which "more stringent" requirements occur in the NCP is far removed from the concerns at issue in this case.

Second, Lodi cites to sections of the NCP mentioning more stringent State requirements. We have rejected the Insurers' arguments that by referring to States but not political subdivisions in the text of CERCLA,

> Congress intended to leave room for supplemental State legislation but to prohibit all supplemental municipal legislation. However, this does not mean that Lodi can assume the mantle of the "State" or the breadth of the States's powers ion all circumstances. We have previously distinguished between local governmental unites, such as municipalities, and "States" with regard to various applications of CERCLA. *See Wash. State Dept. of Transp.*, 59 F.3d at 800-1; *Norton Sound*, 138 F.3d at 1284. Our holding her concerns cleanup procedures promulgated by municipalities and other local government entities.

At page *23, append a new footnote 30 as follows after sentence "For the foregoing reasons we AFFIRM IN PART, REVERSE IN PART, and REMAND for further proceedings consistent with this opinion and with instructions to the district courts to determine if Lodi is a PRP":

> Fireman's Fund and Unigard argue that Lodi is a PRP as a matter of law as a result of its agreement with the DTSC. This issue has not been fully briefed on appeal and we leave it to the district court to consider this argument in the first instance.

SO ORDERED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed August 6, 2002]
[Amended October 8, 2002]

Nos. 99-15614, 99-15802
No. CV. 98-1489 FCD-JFM, 98-1712 FCD-JFM

Fireman's Fund Insurance Co.,

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CITY OF LODI, CALIFORNIA,

Defendant-Appellee.

UNIGARD INSURANCE COMPANY, ET AL.,

Plaintiffs-Appellants,

v.

CITY OF LODI,

Defendant-Appellee.

Before: PREGERSON, D.W. NELSON, Circuit Judges and MOSKOWITZ, District Judge.[1]

PREGERSON, Circuit Judge.

This consolidated appeal of two separate actions requires us to consider the constitutionality of an innovative municipal ordinance enacted by the City of Lodi, California ("Lodi" or "the City") to remedy hazardous waste contamination within its borders. Fireman's Fund Insurance Company ("Fireman's Fund"), Unigard Insurance Company, and Unigard Security Insurance Company ("Unigard") (collectively "the Insurers") appeal from the district court's judgments in favor of Lodi in the Insurers' separate but related actions for declaratory and injunctive relief. Both Fireman's Fund and Unigard filed suit to prevent Lodi from enforcing the local ordinance, named the Comprehensive Municipal Environmental Response and Liability Ordinance ("MERLO" or "the Ordinance"), which permits the City to investigate and remediate the hazardous waste contamination of its soil and groundwater.

The Insurers allege that MERLO is preempted by the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, and by various state laws including California's Carpenter-Presley- Tanner Hazardous Substance Account Act, ("HSAA"), Cal. Health & Safety ("H & S") Code §§

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[1] The Honorable Barry Ted Moskowitz, United States District Judge for the Southern District of California, sitting by designation.

25300-25395.15.[2] We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I.
BACKGROUND

A. The Contamination of Lodi's Water

Lodi first detected the presence of tetrachloroethylene ("PCE"), in its groundwater in April 1989. PCE is a known carcinogen that is often used as a dry-cleaning agent.[3]

Groundwater is Lodi's sole source of drinking water and the primary source of water for agricultural use in California's Central Valley.

In 1993, the Department of Toxic Substances Control ("DTSC") of the California Environmental Protection Agency began investigating Lodi's PCE contamination. DTSC is the

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2 Pursuant to a sunset clause, the original Carpenter-Presley-Tanner Hazardous Substance Account Act, also known as the California Superfund, became inoperative on January 1, 1999. HSAA, Cal. H & S Code § 25395. The reenacted HSAA went into effect on May 26, 1999, without a sunset clause. Actions and agreements pursuant to the previous version of HSAA are governed by the reenacted law. *See* 1999 Ch. 23 § 3.

3 *See* Central Valley Regional Water Quality Control Board, "Dry Cleaners--A Major Source of PCE in Ground Water," pp. 20-21, March 27, 1992.

state agency responsible for ensuring that California's public health and environment are protected from the harmful effects of hazardous substances. *See* Cal. H & S Code §§ 25312, 25313, 25350-25359.8. DTSC is authorized to oversee the cleanup of hazardous waste sites by issuing remedial orders and by entering into agreements with "potentially responsible parties" ("PRPs" or "RPs") to facilitate remediation.

DTSC's investigation revealed that four small businesses were potentially responsible for the PCE-contaminated waste-water that migrated throughout Lodi by land disposal, sewer lines, and city water wells. One business, Lustre-Cal Nameplate Corporation ("Lustre Cal")--a manufacturer of color anodized and etched aluminum nameplates and labels--is insured by defendant Fireman's Fund. Another business, Busy Bee Laundry & Cleaners ("Busy Bee")--a dry cleaner--was a tenant of M & P Investments, which is insured by defendant Unigard. As a result of its investigation, DTSC listed the "Lodi Groundwater Site" as a state hazardous waste site beginning in fiscal year 1993-94.[4] This is significant because listed sites are subject to the "procedures, standards, and other requirements" of HSAA. Cal. H & S Code § 25356(d). After it listed the Lodi Groundwater Site, DTSC began an HSAA-authorized administrative action against selected PRPs, including Lodi, to address the soil and groundwater contamination.[5]

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[4] *See* Cal. H & S Code §§ 25355-6 (describing California's listing procedures).

[5] The federal Environmental Protection Agency ("EPA") has never employed federal resources to initiate a comparable administrative proceeding at the federal level. The EPA

B. Lodi's Investigation and Remediation Strategy

In May 1997, Lodi and DTSC entered into a "Comprehensive Joint Cooperation Agreement" ("Cooperative Agreement" or "Agreement").[6] Under the Agreement, DTSC and Lodi agree to "coordinate and cooperate in a single and consolidated effort" to timely investigate and remediate the hazardous substance contamination affecting the City. Consistent with this joint effort, DTSC designates Lodi the "lead enforcement entity" in the cleanup of hazardous substances in and around the City. In exchange, Lodi agrees to "actively seek the input ... of DTSC in the settlement of any environmental enforcement actions" brought by the City pursuant to the Cooperative Agreement, and DTSC agrees "not to independently prosecute any claims [against PRPs]

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has also never listed the Lodi Groundwater Site on the National Priorities List ("NPL"), a list of those sites that the EPA has determined are most in need of remediation. *See* 42 U.S.C. § 9605(a)(8)(B) (2001). Only NPL listed sites are eligible to receive federal Superfund dollars. *See* 40 C.F.R. § 300.425(b)(1).

6 DTSC had the authority to enter into the Cooperation Agreement under HSAA. As the Agreement itself states, DTSC entered into the Agreement "pursuant to its authority as set forth in Chapters 6.5 and 6.8 of the California Health and Safety Code [the HSAA], as well as its inherent governmental authority to resolve claims within its jurisdiction." *See also* Cal. H & S Code § 25355.5(a)(1)(C) (authorizing DTSC to enter into "agreements" with PRPs or "other parties"); Cal. H & S Code § 25358.3.

without the full cooperation of ... Lodi." Lodi also agrees either to clean up the contamination itself or to compel PRPs to do so.

In furtherance of remediation, the Agreement, at section VI.(A)(1), requires Lodi to:

> utiliz[e], as appropriate, the full range of its remedial and regulatory injunctive and cost recovery authority under federal, state and municipal law, to compel the complete, timely, competent, cost-effective performance of the Work in full compliance with federal, state and local law, specifically including the NCP,[7] as appropriate. These enforcement efforts will include ... *the prompt enactment and enforcement of a comprehensive municipal environmental response ordinance which shall enact into municipal law additional legal authorities* to appropriately supplement the City of Lodi's already extensive environmental response authority under federal, state and local law....(emphasis added). The Agreement

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[7] Under CERCLA, the cleanup of listed hazardous waste sites must be consistent with the National Contingency Plan ("NCP")--a plan promulgated by the EPA that "specifies the roles" of the federal, state, and local governments "in responding to hazardous waste sites, and establishes the procedures for making cleanup decisions." *United States v. City of Denver,* 100 F.3d 1509, 1511 (10th Cir.1996); *see* 40 C.F.R. § 300 *et seq.*

> further states that DTSC retains its authority under HSAA to oversee Lodi's investigation and remediation efforts, and to review and approve any remediation plan developed by the City.

Lodi acknowledges, as part of the Agreement, that DTSC "may have certain claims against the City of Lodi relating to the released Hazardous Substances, which arise from or relate to the City of Lodi's design, construction, operation or maintenance of the commercial, industrial and residential storm and sanitary sewer systems operated by the City." In light of this acknowledgment, Lodi agrees to reimburse DTSC for past and future response costs not to exceed $1,024,549.55, if those costs are not reimbursed by PRPs as a result of Lodi's investigation and remediation efforts. Nevertheless, Lodi continues to deny being a PRP. Indeed, the Cooperative Agreement between DTSC and Lodi specifically includes a section entitled "No Admission of Liability," in which Lodi expressly disclaims any admission of liability "arising from or relating to the City of Lodi's design, construction, maintenance, or operation of sanitary and storm sewer systems. . . ."

In consideration for Lodi's agreement to reimburse DTSC, DTSC grants Lodi a "covenant not to sue with respect to claims arising from . . . Lodi's design, construction, operation or maintenance of any storm or sanitary sewer systems." DTSC also agrees to protect Lodi from contribution actions under CERCLA, 42 U.S.C. § 9613(f)(2), and California's contribution statute, Cal. Code Civ. Pro. § 877, for "matters addressed" in the Cooperative Agreement.

On August 6, 1997, Lodi's City Council enacted the "comprehensive municipal environment response and liability ordinance" as required by the Cooperative Agreement. Ordinance 1650--commonly known as MERLO--is the subject of this suit. It sets forth a comprehensive remedial liability scheme modeled on CERCLA and HSAA. MERLO specifically provides Lodi with municipal authority to investigate and remediate existing or threatened environmental nuisances affecting the City, and to hold PRPs or their insurers liable for the cost of the City's nuisance abatement activities. *See generally* MERLO §§ 8.24.010- 8.24.090.[8]

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[8] On November 17, 1999, Lodi's City Council repealed Ordinance 1650 and reenacted an amended version of MERLO as Ordinance No. 1684. The amended version of MERLO became effective on December 17, 1999. Because we apply the law in effect at the time of decision, we must decide the issues raised in these related appeals based on the current version of MERLO. *See Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 711, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974). Although the reenacted version of MERLO became effective while the Insurers' appeals were pending before this court, neither party has moved to dismiss the present appeals as moot. Moreover, our analysis of the two versions of MERLO reveals that Ordinance No. 1684 is substantially similar to the original version of MERLO. Indeed, with two exceptions, the Insurers argue that Lodi has merely repealed one preempted ordinance and replaced it with a second ordinance that is similarly preempted. *Cf. Public Serv. Co. of Colorado v. Shoshone- Bannock Tribes*, 30 F.3d 1203, 1205-06 (9th Cir.1994). Thus, the core disputes between the parties remain.

Furthermore, the reenacted MERLO specifically provides

In order to facilitate this effort, MERLO: (1) authorizes Lodi to demand the production of documents related to environmental contamination or to any PRP's ability to pay for investigation and abatement, *id.* § 8.24.050; (2) creates an administrative hearing process subject to judicial review to resolve liability issues, *id.* at § 8.24.060; (3) authorizes Lodi to initiate municipal enforcement actions against PRPs, *id.* at § 8.24.080; (4) authorizes Lodi to bring direct actions against insurers of insolvent PRPs that would resolve the PRP's liability and the insurers' coverage obligations in one proceeding, *id.* at § 8.24.090(B); and (5) creates a "Comprehensive Environmental Response Fund" to be used for the investigation and abatement of environmental nuisances in and around Lodi, *id.* at § 8.24.070.

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that any action taken under the original MERLO "shall remain in effect" under the reenacted version of the Ordinance. The reenacted MERLO also provides that any changes made to the Ordinance as a result of the amendments apply retroactively to all proceedings initiated under the original MERLO. Finally, the general "savings clause" in Lodi Municipal Code § 1.01.080, which was enacted in 1985 well before Lodi adopted either version of MERLO, further establishes the continuing viability of any remedial enforcement actions initiated by Lodi before it repealed and reenacted MERLO.

Accordingly, we hold that the controversy between the Insurers and Lodi is still "live" and that the repeal and reenactment of MERLO did not moot the Insurers' claims at issue in this appeal. We express no opinion, however, on whether the reenacted version of MERLO may moot or otherwise impact some of the issues to be considered by the district court for the first time on remand.

MERLO is modeled on both CERCLA and HSAA, and it incorporates many of the standards employed by CERCLA and HSAA. For example, MERLO utilizes the CERCLA and HSAA definition of who may be considered a PRP, *see* MERLO § 8.24.040(A)(1), and, like CERCLA, imposes joint and several liability on PRPs. *See* MERLO § 8.24.040(E).

C. Procedural History of the Present Actions

As set forth above, this consolidated appeal involves two separate but related challenges to MERLO--one brought by Unigard, and a second brought by Fireman's Fund.

1. The Origins of the Unigard and Fireman's Fund Actions

In May 1998, Lodi filed an abatement action pursuant to its authority under MERLO against Unigard's insured, M & P Investments. Three weeks later, Unigard filed the present action in United States District Court for the Northern District of California. In its complaint, Unigard alleges that Lodi adopted MERLO in order to shift its own liability for the PCE contamination to the insurers of other PRPs. Unigard's complaint further alleges that MERLO: (1) violates the Supremacy Clause of the United States Constitution because it is preempted by CERCLA; (2) violates Article 11 of the California State Constitution because it is preempted by HSAA and California Insurance Code § 11580; and (3) violates the Contracts Clause of the United States Constitution.

Finding that Unigard's claims "have an insufficient connection to the Northern District of California," the District Court transferred the action to the Eastern District of California. All of Unigard's claims were dismissed prior to the transfer, with the exception of the federal and state preemption claims, and the federal contracts clause claim.

In August 1998, Fireman's Fund filed a similar declaratory and injunctive relief action against Lodi in the United States District Court for the Eastern District of California. In addition to naming Lodi as a defendant, Fireman's Fund also named: (1) Lodi's Mayor, Jack Sieglock, in his official capacity; (2) MERLO Enforcement Officers Richard C. Prima, Jr. and Fran E. Forkas in their official capacities; (3) Lodi City Attorney Randall A. Hays in his official and individual capacities; and (4) Michael C. Donovan and Zevnik Horton Guibord & McGovern, LLP (collectively, the "Law Firm"), private attorneys acting as assistant city attorneys for Lodi, in their official and individual capacities.[9] Like Unigard's complaint, the Fireman's Fund complaint alleges, *inter alia,* that MERLO: (1) violates the Supremacy Clause of the United States Constitution; (2) violates Article 11 of the California State Constitution because it is preempted by HSAA and California Insurance Code § 11580; and (3) impairs Fireman's Fund's right to contract under both the United States Constitution and the California State Constitution.

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[9] Additional individual defendants Steven H. Doto, John R. Till, Bret A. Stone, and Adam L. Babich were dismissed without prejudice by stipulation of the parties on September 21, 1998.

On August 24, 1998, Fireman's Fund, joined by Unigard, moved for a preliminary injunction prohibiting Lodi from enforcing MERLO. While the Insurers' preliminary injunction motion was pending, Lodi and its officers moved, in both actions, to dismiss the Insurers' complaints pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, and Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. At the same time, Fireman's Fund filed a motion for partial summary judgment and for a permanent injunction to enjoin Lodi from enforcing MERLO.

After extensive briefing by all parties, the district court held a joint hearing on all motions in both cases on December 4, 1998. Following the hearing, the district court issued two written decisions, one in each action.[10]

2. The Unigard Decision

In an unpublished decision, the district court found Unigard's claims ripe for review because "the content of [MERLO] is clear as are the City's intentions to enforce the Ordinance against Unigard." *Unigard Ins. Co. v. City of Lodi,* No. Civ. S. 98-1712-FCD-JFM at *5 (E.D.Cal. Mar. 5, 1999). The district court also found that Unigard has standing to bring the present action, *id.* at 6, and that MERLO is not preempted by CERCLA, *id.* at 6- 13. Finally, the district court abstained under the *Pullman* abstention

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[10] We note that the district court did an admirable job in sorting through the varied and difficult issues raised in this highly complex case.

doctrine[11] from deciding whether MERLO was preempted by state law. *Id.* at 14-15. Based on these rulings, the district court granted Lodi's motion to dismiss Unigard's federal preemption claim and dismissed without prejudice Unigard's state preemption and federal contracts clause claims. Unigard timely appeals the district court's ruling concerning only the federal preemption issue.

3. The Fireman's Fund Decision

In a published opinion, the district court dismissed Fireman's Fund's claims against the individual defendants in their official capacities as "duplicative of the claims against the City." *Fireman's Fund Ins. Co. v. City of Lodi,* 41 F.Supp.2d 1100, 1106 (E.D.Cal.1999). The district court also held that the defendants sued in their individual capacities are entitled to qualified immunity. *Id.* at 1107. The rulings on the remaining issues--including ripeness, standing, and federal and state preemption--were identical to those rulings in the Unigard action. *Id.* at 1107-13. The district court found that: (1) Fireman's Fund's claims are ripe; (2) Fireman's Fund has standing to bring the instant action; and (3) MERLO is not preempted by CERCLA. Again, the

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[11] The *Pullman* abstention doctrine derives its name from the case of *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), and is "an equitable doctrine that allows federal courts to refrain from deciding sensitive federal constitutional questions when state law issues may moot or narrow the constitutional questions." *The San Remo Hotel v. City of San Francisco,* 145 F.3d 1095, 1104 (9th Cir.1998). *Pullman* abstention is discussed in greater detail at Section III.A. *infra.*

district court abstained from deciding whether MERLO is preempted by HSAA based on the doctrine of *Pullman* abstention.

Based on these rulings, the district court denied Fireman's Fund's motion for partial summary judgment and a permanent injunction, dismissed the individual defendants and the Law Firm from the action, dismissed the federal preemption claim against Lodi, and abstained from ruling on the state preemption claim. The district court dismissed the state preemption and remaining constitutional claims without prejudice.

Fireman's Fund timely appeals the district court's rulings concerning federal and state preemption, and the district court's dismissal of the official capacity claims against the individual defendants.

II.
STANDARD OF REVIEW

We review de novo a district court's decision to grant or deny a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *Gonzalez v. Metropolitan Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir.1999). In reviewing the complaint, all factual allegations "are taken as true and construed in the light most favorable to [p]laintiffs." *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir.1996).

Similarly, we review de novo whether this case meets the requirements of the *Pullman* abstention doctrine. *Martinez v. Newport Beach City*, 125 F.3d 777, 780 (9th

Cir.1997). The district court has no discretion to abstain in cases that do not meet the requirements of the abstention doctrine being invoked. *Id.*

III.
ANALYSIS

On appeal, Fireman's Fund asserts that the district court erred in abstaining from deciding whether MERLO is preempted by various state laws, and Fireman's Fund and Unigard argue that MERLO is in fact preempted by state and federal law. We find that the district court erred in abstaining from deciding whether MERLO is preempted by state law. Because the state law preemption analysis resembles the federal preemption analysis, we consider whether MERLO is preempted by federal law in conjunction with the state law preemption question. We conclude by finding that although a few sections of MERLO are preempted by state and federal law under the doctrine of conflict preemption, the majority of the Insurers' preemption arguments lack merit.

In addition, Fireman's Fund appeals the district court's decision dismissing its official capacity claims against three individual defendants. We agree with Fireman's Fund and reinstate those claims.

A. ABSTENTION

Three factors must be present before a district court may abstain under the *Pullman* doctrine: "(1) the complaint must involve a 'sensitive area of social policy' that is best left to the states to address; (2) 'a definitive ruling on the state issues by a state court could obviate the need for [federal]

constitutional adjudication by the federal court';[12] and (3) 'the proper resolution of the potentially determinative state law issue is uncertain.' " *Cedar Shake and Shingle Bureau v. City of Los Angeles,* 997 F.2d 620, 622 (9th Cir.1993) (quoting *Kollsman v. City of Los Angeles,* 737 F.2d 830, 833 (9th Cir.1984)). If a court invokes *Pullman* abstention, it should stay the federal constitutional question "until the matter has been sent to state court for a determination of the uncertain state law issue." Erwin Chemerinsky, *Federal Jurisdiction,* § 12.2.1, at 737 (3d ed.1999).[13]

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12 We have held that *Pullman* abstention is not appropriate when the federal question at stake is one of federal preemption because preemption is not considered a "constitutional issue." *Hotel Employees and Rest. Employees Int'l Union v. Nevada Gaming Comm'n,* 984 F.2d 1507, 1512 (9th Cir.1993) ("*Pullman* abstention is not appropriate because preemption is not a constitutional issue."). *But see International Bhd. of Elec. Workers, Local Union No. 1245 v. Public Serv. Comm'n of Nev.,* 614 F.2d 206 (9th Cir.1980) (invoking *Pullman* abstention in a case involving preemption under the National Labor Relations Act). In this case, however, the district court properly addressed the merits of the Insurers' federal preemption claims, and invoked *Pullman* abstention only to avoid reaching Fireman's Fund's additional claims for relief based on the Due Process, Equal Protection, and Contracts Clauses of the U.S. Constitution.

13 Both Fireman's Fund and Lodi agree that the even if the district court did not err in abstaining, it erred in dismissing the Fireman's Fund's remaining federal and state constitutional claims; the district court instead should have stayed the action and retained jurisdiction over the

As to the first factor, we do not believe that "the complaint . . . involve[s] a sensitive area of social policy that is best left to the states to address." *Cedar Shake and Shingle Bureau,* 997 F.2d at 622 (internal quotation omitted). Although the interpretation of a local ordinance that enables the City to pay for hazardous waste remediation is undoubtedly an area of "serious local concern," as the district court held, it cannot be said that states should be left to address the coordination of such remediation alone. The federal government has definitively entered the field of hazardous waste remediation by enacting CERCLA. Moreover, the text of CERCLA makes clear that Congress envisioned a partnership between various levels of government in addressing the complex and costly problems associated with hazardous waste remediation. *See, e.g.*, 42 U.S.C. §§ 9614(a), 9652(d), 9659(h). The exact contours of such a partnership, though indeed a sensitive area of social policy, need not be resolved by states in isolation. We therefore find that the district court erred in concluding that the first *Pullman* abstention factor has been satisfied.

The third *Pullman* abstention factor is also lacking. As set forth above, this factor requires us to find that "the proper resolution of the potentially determinative state law issue is uncertain." *Cedar Shake and Shingle Bureau,* 997 F.2d at 622 (internal quotation and citation omitted). The fact that a state court has not ruled on the precise issue at stake in this case does not mean that the proper resolution of the state

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remaining federal claims pending resolution of the relevant state law issues in state court. *See International Bhd. of Elec. Workers,* 614 F.2d at 213.

law issue is "uncertain." *Wis. v. Constantineau,* 400 U.S. 433, 439, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); *see also Pearl Invest. Co. v. City & County of San Francisco,* 774 F.2d 1460, 1465 (9th Cir.1985) (holding that uncertainty for *Pullman* abstention means that a federal court cannot predict with any confidence how a state's highest court would decide an issue of state law).

We find it fairly clear that MERLO as a whole is consistent with state law, and that municipalities in California may enact local ordinances that allow them to take an active role in remediating local hazardous waste contamination. *See* Section III.B.2.d. *infra.* Even if the state court were to find, as we do *infra,* that a few specific provisions of MERLO are preempted, such a finding would invalidate only those specific provisions. The bulk of MERLO would remain in effect, as would our obligation to consider Fireman's Fund's federal constitutional claims. *Pullman* abstention is therefore inappropriate.

Because there is no discretion to abstain in cases that do not meet the requirements of the abstention doctrine being invoked, *Martinez,* 125 F.3d at 780, we hold that the district court erred in abstaining from ruling on Fireman's Fund's state law preemption claim. We proceed now to the merits of the federal and state preemption analysis.

B. PREEMPTION

Fireman's Fund argues that MERLO is preempted by state law. In addition, both Fireman's Fund and Unigard argue that MERLO is preempted by federal law.

Under the Supremacy Clause of the United States Constitution, state laws that "interfere with, or are contrary to the laws of Congress" are preempted and are therefore invalid. *Gibbons v. Ogden,* 22 U.S. (9 Wheat) 1, 211, 6 L.Ed. 23 (1824). "Congressional intent governs our determination of whether federal law preempts state law. If Congress so intends, '[p]re-emption . . . is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Boyes v. Shell Oil Prods. Co.,* 199 F.3d 1260, 1267 (11th Cir.2000) (quoting *Gade v. National Solid Wastes Mgmt. Ass'n,* 505 U.S. 88, 96, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) (plurality)).

California preemption doctrine is based on Article XI, section 7 of the California Constitution, which states that "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations *not in conflict* with general laws." Cal. Const., art. XI, § 7 (emphasis added); *Sherwin-Williams Co. v. City of Los Angeles,* 4 Cal.4th 893, 16 Cal.Rptr.2d 215, 217, 844 P.2d 534 (1993). The California Supreme Court has held that State Law is "in conflict with" or preempts local law if the local law "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." *Sherwin- Williams,* 16 Cal.Rptr.2d at 217, 844 P.2d 534.

1. Field Preemption

As the Insurers acknowledge, CERCLA contains three separate savings clauses to preserve the ability of states to

regulate in the field of hazardous waste cleanup. First, CERCLA § 114(a) states that "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a). Second, CERCLA § 302(d) states that "[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to release of hazardous substances or other pollutants or contaminants...." 42 U.S.C. § 9652(d). And third, CERCLA § 310(h) states that "[t]his chapter does not affect or otherwise impair the rights of any person under Federal, State, or common law, except with respect to the timing of review as provided in section 9613(h)," a CERCLA provision that is not at issue in the present case. 42 U.S.C. § 9659(h). Based on these provisions, this court has held that "CERCLA does not completely occupy the field of environmental regulation." *ARCO Envtl. Remediation, LLC v. Dep't of Health and Envtl. Quality,* 213 F.3d 1108, 1114 (9th Cir.2000).

Notwithstanding this precedent, the Insurers argue that MERLO is preempted by the combined impact of CERCLA and HSAA under the doctrine of field preemption. According to the Insurers, CERCLA and HSAA, *together,* occupy the field because CERCLA explicitly authorizes states, but not municipalities, to impose additional requirements regarding the cleanup of hazardous substances. The Insurers' argument is based on the premise that, by referring to states but not political subdivisions in the text of the statute, Congress intended CERCLA to leave room for supplemental state legislation but to prohibit supplemental municipal legislation.

This argument is contrary to the Supreme Court's ruling in *Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991), contrary to the language of the statute itself, and contrary to reason. In *Mortier,* the Supreme Court considered whether the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") preempted a local ordinance adopted by the city of Casey, Wisconsin. *Id.* at 602, 111 S.Ct. 2476. The Court began its analysis by noting that FIFRA expressly authorizes "State[s]" to regulate pesticides, but makes no reference in the savings clause to political subdivisions of states. *Id.* at 606-07, 111 S.Ct. 2476. The Court went on to find, however, that the term "State" is broad enough to encompass political subdivisions, and that the fact that FIFRA is silent with respect to the power of local governments "cannot suffice to establish a clear and manifest purpose to preempt local authority." *Id.* at 607, 111 S.Ct. 2476 (internal quotation omitted). As the Court explained:

> The exclusion of political subdivisions cannot be inferred from the express authorization to the "State[s]" because political subdivisions are components of the very entity the statute empowers. Indeed, the more plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the "absolute discretion" of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities.

Id. at 608, 111 S.Ct. 2476.

We find that *Mortier's* reasoning regarding FIFRA is equally applicable to CERCLA. Like FIFRA, CERCLA anticipates that states will enact supplemental remedial environmental legislation. Moreover, like FIFRA, the CERCLA savings clauses refer only to "State[s]," while CERCLA specifically refers to both states and political subdivisions in other provisions. *Compare* 42 U.S.C. § 9614(a) (referring only to "State[s]"), *with* 42 U.S.C. § 9606(a) (referring to "a State or local government").

Indeed, here California has exercised its discretion to permit municipalities to regulate hazardous waste remediation in some circumstances. The California Constitution provides Lodi and other cities with broad municipal authority to address local environmental nuisances, Cal. Const., Art. XI, § 7, and the California Legislature has adopted numerous laws authorizing political subdivisions to adopt ordinances for the protection of the environment. *See, e.g.*, Cal. Gov't Code § 38771 (West 2001) (providing cities with the authority to determine what constitutes a public nuisance); Cal. Gov't Code § 38773 (West 2001) (granting cities the authority to provide for the abatement of public nuisances).

In addition, the text of HSAA contemplates the ability of cities to adopt parallel municipal environmental ordinances. HSAA defines an authorized release into the environment as including a release "which is authorized by statute, *ordinance,* or rule of any state, regional, or *local agency or government."* Cal. H & S Code § 25326 (emphasis added). HSAA's savings clause provides that with certain exceptions not applicable here, HSAA does not "affect or modify in any way the obligations or liabilities of any person under any other provision of *state* or federal laws." Cal. H & S Code § 25366

(emphasis added). Significantly, the phrase "state law" is used in § 25326 to include municipalities. *See* Cal. H & S Code § 25326 ("A 'release authorized or permitted pursuant to state law' means any release into the environment which is authorized by statute, ordinance, regulation, or rule of any state, regional, or local agency or government ...").

Finally, the text of CERCLA indicates that Congress anticipated remedial actions undertaken by local governments independent of CERCLA's own provisions:

> *In addition to any other action taken by a State or local government,* when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat [proceeding under the provisions of CERCLA]....

42 U.S.C. § 9606(a) (emphasis added).

In the absence of a strong indication to the contrary, we adhere to the presumption that Congress did not intend CERCLA to "den[y] local communities throughout the Nation significant powers of self-protection." *Mortier,* 501 U.S. at 621, 111 S.Ct. 2476 (Scalia, J., concurring); *see also Western Oil and Gas Assoc. v. Monterey Bay Unified Air Pollution Control Dist.,* 49 Cal.3d 408, 261 Cal.Rptr. 384 393-94, 777 P.2d 157 (1989) ("In view of the long tradition

of local regulation and the legislatively imposed duty [on local governments] to preserve and protect the public health, preemption may not be lightly found."). Accordingly, we hold that CERCLA permits both states and their political subdivisions to enact hazardous waste regulations and pursue additional remedies, as long as those remedies do not conflict or interfere with "the accomplishment and execution of [CERCLA's] full purpose and objective. . . ." *Indus. Truck Ass'n v. Henry,* 125 F.3d 1305, 1309 (9th Cir.1997).

2. Conflict Preemption

The Insurers next assert that CERCLA and HSAA preempt seven specific portions of MERLO under the doctrine of conflict preemption. We will find federal conflict preemption where "compliance with both the federal and state regulations is a physical impossibility," or when the state law stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *California Fed. Sav. and Loan Ass'n v. Guerra,* 479 U.S. 272, 281, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987). Similarly, we will find conflict preemption under California law when a local ordinance prohibits conduct that is expressly authorized by state statute or authorizes conduct that is expressly prohibited by state general law. *Sports Comm. Dist. v. County of San Bernardino,* 113 Cal.App.3d 155, 159, 169 Cal.Rptr. 652 (1980).

The Insurers challenge the following seven sections of MERLO as preempted: (a) the MERLO section permitting Lodi to be compensated for damage to its natural resources; (b) MERLO's general liability scheme, including the sections of MERLO that provide for the joint and several liability of

PRPs, and the sections setting forth the contribution rights of PRPs; (c) MERLO's burden of proof for establishing a defense to liability; (d) the MERLO sections addressing the cleanup standard set forth in the NCP; (e) the MERLO sections defining "abatement action costs" to permit Lodi to recover attorney's fees and interest; (f) the MERLO section authorizing Lodi to gather certain information from PRPs and their insurers; and (g) the MERLO section permitting Lodi to bring direct actions against insurers of PRPs.

(a) Natural Resource Damages

MERLO states that PRPs shall be liable for "[d]amages for injury to, destruction of, or loss of *natural resources,* including the reasonable costs of assessing such injury, destruction, or loss resulting from the environmental nuisance." MERLO § 8.24.040(A)(9)(c) (emphasis added). The Insurers contend that this provision is preempted by state and federal law because "under CERCLA and ... HSAA, a State must designate a city as its authorized representative before a city may seek natural resource damages." According to the Insurers, because Lodi has not been designated the "authorized representative" of the State of California, it cannot recover for damages to its natural resources. We disagree.

CERCLA provides states, federal agencies, and Indian Tribes with a federal cause of action to sue for damages to natural resources that they hold in trust for the public. *See* 42 U.S.C. §§ 9607(a)(4)(C), (f)(1). Specifically, CERCLA states that:

> In the case of an injury to, destruction of, or loss of natural resources under [107(1)(4)(C)] liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by or appertaining to such State.... The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages.

42 U.S.C. § 9607(f)(1). Similarly, under HSAA, the Governor of California or an "authorized representative" of the State may recover natural resources damages. Cal. H & S Code § 25352(c).

It is unnecessary for us to determine whether a municipality may recover under CERCLA for damage to its natural resources in the absence of being designated the authorized representative of a state.[14] Lodi does not assert that

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[14] Several district courts in other circuits have addressed this question, however. In the wake of the 1996 SARA amendments to CERCLA, these district courts have uniformly held that a municipality may not bring a CERCLA cause of action "as a public trustee" of a state's natural resources unless the municipality has been appointed by the governor of its respective state. *See, e.g., Borough of Sayreville v. Union Carbide Corp.*, 923 F.Supp. 671, 680-81 (D.N.J.1996); *Borough of Rockaway v. Klockner & Klockner,* 811 F.Supp. 1039, 1049-51 (D.N.J.1993); *City of Toledo v. Beazer Materials & Servs., Inc.*, 833 F.Supp. 646, 652 (N.D.Ohio 1993); *City*

MERLO permits the City to sue for damages to its natural resources under CERCLA or HSAA. Rather, Lodi asserts that because "neither CERCLA nor . . . HSAA purport to abrogate other causes of action, including common law actions, for damage to natural resources, including natural resources held in trust by ... municipalities," Lodi remains free to enact local ordinances such as MERLO that permit the City to recover for damage to such resources. We agree.

Notwithstanding any authority under CERCLA or HSAA that Lodi may acquire by delegation, Lodi retains its independent authority to protect its proprietary interest in natural resources held in trust by the City. We have held that although municipalities may not "sue as parens patriae [to protect their natural resources] because their power is derivative [of the state and] not sovereign," municipalities may " 'sue to vindicate such of their own *proprietary interests* as might be congruent with the interests of their inhabitants.' " *Colorado River Indian Tribes v. Town of Parker,* 776 F.2d 846, 848-49 (9th Cir.1985) (quoting *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31,* 481 F.2d 122, 131 (9th Cir.1973))(explaining that the concept of parens patriae is derived from authority invested in the English Sovereign to protect the interest of his subjects and has devolved in this country only to the states and federal government, whereas municipalities, which lack sovereignty, do retain authority to vindicate such of their own proprietary interests as are congruent with the interests of their inhabitants) (emphasis

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of Heath v. Ashland Oil, Inc., 834 F.Supp. 971, 976-77 (S.D.Ohio 1993); *Town of Bedford v. Raytheon Co.*, 755 F.Supp. 469, 471- 73 (D.Mass.1991).

added). Consistent with this holding, we find that Lodi retains its authority under state law to protect its proprietary interest in its natural resources from damage. Moreover, to the extent that natural resources owned or held in trust by Lodi are damaged by environmental contamination, we find that nothing in CERCLA or HSAA prevents the City from suing under MERLO to recover for damage to such resources.

Likewise, allowing the City to do so does not conflict with either state or federal law. A finding of liability for natural resource damage under MERLO would not make compliance with CERCLA or HSAA impossible. *See Indus. Truck Ass'n,* 125 F.3d at 1309 (explaining that court will find federal conflict preemption when "it is impossible to comply with both state and federal requirements"). Nor would it "stand as an obstacle to" accomplishing and executing the goals of CERCLA and HSAA. *Id.* (stating that courts will find federal conflict preemption when "state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress").

We therefore find that MERLO § 8.24.040(A)(9)(c) is not preempted by state or federal law.

(b) MERLO's Liability Scheme

The Insurers next allege that the provisions of MERLO providing for recovery of cleanup costs from PRPs conflict with and are therefore preempted by CERCLA and HSAA. MERLO allows the City, once it has incurred cleanup costs, to impose joint and several liability on PRPs for the entire amount of its costs. *See* MERLO § 8.24.040. At the same time, MERLO fails to provide a mechanism whereby

PRPs may impose on the City its fair share of costs incurred (whatever that fair share might be). Under the facts of this case, we agree that portions of this liability scheme are preempted if the district court finds that Lodi is a PRP.

Section 107 of CERCLA permits the government or a private party who has incurred response costs to bring suit against a PRP to recover those costs. *See* 42 U.S.C. § 9607. Applying federal common law principles, we have interpreted Section 107 as imposing joint and several liability on PRPs whenever the harm caused to a site is indivisible. *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 362 (9th Cir.1998). Importantly, because liability is joint and several, a defendant PRP in a cost-recovery action under Section 107 may be held fully liable for the entire clean-up costs at a site, despite the fact that the defendant PRP was in fact responsible for only a fraction of the contamination.

Moreover, as originally enacted, CERCLA did not provide PRPs with an express cause of action for contribution. *See Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 348 (6th Cir.1998). Without a claim for contribution, any individual PRP could be singled out as a defendant in a Section 107 cost-recovery action and required to reimburse the Section 107 plaintiff for response costs far in excess of the defendant PRP's pro rata share. Because such a result appeared inequitable, many courts recognized an implicit right to contribution under Section 107, where a PRP was subject to joint and several liability and incurred response costs in excess of its fair share. *See, e.g., Mardan Corp. v. C.G.C. Music Ltd.*, 804 F.2d 1454, 1457 & n. 3 (9th Cir.1986).

In 1986, Congress amended CERCLA by passing the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 42 U.S.C. §§ 9601-9675. Among other additions, SARA added CERCLA § 113(f), which explicitly recognizes a claim for contribution. *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1300 (9th Cir.1997). "A PRP's contribution liability [under CERCLA § 113(f)] correspond[s] to that party's equitable share of the total liability. . . ." *Id.* at 1301. Thus, CERCLA § 107 and CERCLA § 113 provide different remedies: a defendant in a § 107 cost-recovery action may be *jointly and severally liable* for the total response cost incurred to cleanup a site, whereas a defendant in a § 113(f) contribution action is *liable only for his or her pro rata share* of the total response costs incurred to cleanup a site.

Like CERCLA, HSAA explicitly authorizes any PRP that has incurred response costs to seek contribution from any other PRP. Cal. H & S Code § 25363(e). However, "unlike liability under CERCLA, liability under HSAA is not truly joint and several. Any person found liable for costs under [ ] HSAA who establishes by a preponderance of the evidence that only a portion of those costs or expenditures are attributable to that person's actions will be required to pay only for that portion." Bancroft-Whitney, California Civil Practice, *Environmental Litigation,* § 3:85 (1993); *see also* Cal. H & S Code § 25363(a). Liability under HSAA is therefore apportioned according to fault.

The Insurers first argue that MERLO conflicts with CERCLA and HSAA because "CERCLA and HSAA allow any PRP that has incurred response costs to seek contribution from any other PRP," whereas under MERLO, Lodi cannot

be sued for contribution.

This conflict preemption argument is rooted in the Insurers' assumption that Lodi is a PRP. To date, however, Lodi has not been administratively adjudged a PRP by either the federal EPA or California's DTSC. Nor has a court adjudged Lodi a PRP. While we decline to decide whether Lodi is a PRP on the record before us, we note that it is doubtful whether Lodi may be considered a PRP merely as a result of operating its municipal sewer system. *See Lincoln Prop., Ltd. v. Higgins,* 823 F.Supp. 1528, 1539-44 (E.D.Cal.1992) (holding that a municipal operator of a sewer system that leaked hazardous waste could rely on a third-party defense to avoid liability under CERCLA). *But see Westfarm Assocs. v. Wash. Suburban Sanitary Comm'n,* 66 F.3d 669, 675-80 (4th Cir.1995) (holding that a municipal operator of a sewer system is liable for the acts of a third party that discharges hazardous waste into the system). *See also* Robert M. Frye, *Municipal Sewer Authority Liability Under CERCLA: Should Taxpayers Be Liable For Superfund Cleanup Costs?,* 14 Stan. Envtl. L.J. 61 (1995) (criticizing the *Westfarm* decision and arguing that municipalities should not bear CERCLA liability for operating sewer systems because some leakage from sewers is unavoidable and the parties dumping chemicals into the sewer, not the operator of the sewer, is the responsible party). We remand to the district court the question of whether Lodi is a PRP.

If the district court finds that Lodi is a PRP, MERLO is preempted to the extent that it protects Lodi from

contribution claims by other PRP's.[15] CERCLA permits a PRP who incurs response costs to bring suit to recover those costs from any other PRP. Thus, in theory, Fireman's Fund's or Unigard's insured could remediate the Lodi site and then sue the City pursuant to CERCLA § 113(f) or HSAA § 25356(e) for contribution in the amount of Lodi's fair share of the costs. If Lodi is indeed a PRP, it cannot simply legislate away this potential contribution liability under state and federal law. For these reasons, we find that MERLO is preempted to the extent that it legislatively insulates Lodi from contribution liability under state and federal law.[16]

Next, the Insurers allege that MERLO conflicts with CERCLA because under MERLO § 8.24.040, Lodi may impose joint and several liability for the entire clean-up cost onto any one PRP, whereas CERCLA does not permit "a PRP such as Lodi to impose joint and several liability on other PRPs."

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15 We note that our holding is not inconsistent with the reasoning of other circuits that have held that litigants may not invoke state statutes in order to escape the application of CERCLA's provisions in the midst of hazardous waste litigation. *See, e.g., PMC, Inc. v. Sherwin- Williams Co.*, 151 F.3d 610, 617-18 (7th Cir.1998); *Bedford Affiliates v. Sills*, 156 F.3d 416, 426-27 (2d Cir.1998); *In re Reading Co.*, 115 F.3d 1111, 1117 (3d Cir.1997).

16 In so holding, however, we do not consider whether Lodi may be entitled to contribution protection as a result of the Cooperative Agreement between Lodi and California's DTSC.

Our circuit has held that a PRP may not bring a CERCLA § 107 cost recovery action, and instead may bring only a claim for contribution under CERCLA § 113(f). *Pinal Creek,* 118 F.3d at 1301. This means that a PRP "does not have a claim for the recovery of the totality of its cleanup costs against other PRPs, and a PRP cannot assert a claim against other PRPs for joint and several liability." *Id.* at 1306. In support of our decision in *Pinal Creek,* we noted that allowing a party responsible for part of the contamination to impose joint and several liability on other PRPs would result in unfair cost shifting and "guarantee[ ] inefficiency, potential duplication, and prolongation of the litigation process in a CERCLA case." *Id.* at 1303 (quoting *T H Agric. & Nutrition Co. v. Aceto Chem. Co.,* 884 F.Supp. 357, 361 (E.D.Cal.1995)). We have not recognized any exception to *Pinal Creek* for municipal PRPs and we decline to do so now.

Thus, if the district court determines that Lodi is a PRP, Lodi may not escape its share of responsibility by imposing all the costs of cleanup on others. Allowing it to do so would interfere with CERCLA's PRP cost allocation scheme, and would implicate the same policy concerns relied upon by this court in *Pinal Creek* in rejecting a § 107 cost recovery action for PRPs. *Id.* For these reasons, we find that MERLO is preempted to the extent that it legislatively insulates Lodi from bearing its share of responsibility by imposing joint and several liability on other PRPs.

On the other hand, if the district court finds that Lodi is not a PRP, MERLO's liability scheme does not come into conflict with CERCLA because under CERCLA, a non-PRP may impose joint and several liability on whatever PRPs it can locate. Therefore, if Lodi proves not to be a PRP it may

invoke MERLO's liability scheme without coming into conflict with CERCLA.

(c) MERLO's Burden of Proof for PRPs for Establishing a Defense to Liability

MERLO requires a defendant PRP seeking to apportion its liability to demonstrate by clear and convincing evidence that the harm is divisible, see MERLO § 8.24.040(E), whereas CERCLA and HSAA require a PRP to demonstrate only by a preponderance of the evidence that the harm is divisible. *See* 42 U.S.C. § 9607(b) and Cal. H & S Code § 25363(a). In other words, in order to avoid liability for the entire cleanup, under MERLO a defendant must prove by clear and convincing evidence its proportional responsibility for the hazardous wastes being cleaned.

For the same reasons that Lodi cannot legislatively insulate itself from contribution liability as a PRP under CERCLA, it cannot foist its share of liability onto others by imposing on fellow PRPs a higher burden of proof for apportionment.

Even if the district court finds that Lodi is not a PRP, this particular provision of MERLO conflicts with CERCLA and is preempted because it stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *California Fed. Sav.*, 479 U.S. at 281, 107 S.Ct. 683. A fundamental purpose and objective of CERCLA is to encourage the timely cleanup of hazardous waste sites. *Stanton Road Assoc. v. Lohrey Enter.*, 984 F.2d 1015, 1019 (9th Cir.1993). One of the greatest obstacles to the cleanup of properties that are, or are perceived to be,

contaminated by hazardous substances is the risk of uncertain or overly strict regulatory demands. *See generally* U.S. Envtl. Prot. Agency, *Handbook Of Tools For Managing Federal Superfund Liability Risks at Brownfields And Other Sites,* EPA Publication Number EPA 330-B-98-001 (Nov.1998); *see also* U.S. Conference of Mayors, *Recycling America's Land, A National Report on Brownfields Redevelopment--Volume 3* 7 (2000) (tracing inability to clean up many contaminated sites to overly aggressive liability schemes); Nat'l Governors Ass'n, *New Mission for Brownfields* 13 (2000) (finding "specter of liability" as impediment to investigating and remediating soil and groundwater contamination). Congress, too, has recognized the widespread belief that "fear of prolonged entanglement in[onerous] liability schemes" has become an impediment to cleanup of contamination. S.Rep.No. 107-2, at 2 (2001) (accompanying the Brownfields Revitalization And Environmental Restoration Act of 2001 (codified in scattered sections of 42 U.S.C.)).

Potential purchasers of abandoned or underutilized contaminated properties are often deterred from purchasing and cleaning up these properties by exposure to unbounded and uncertain liability.[17] *See generally* California Center For Land Recycling, *Strategies For Promoting Brownfield Reuse*

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[17] We note that MERLO's application is not limited to contaminated drinking water. It sweeps broadly, encompassing all types of environmental contamination that may result from the releases at issue here, and encompassing virtually all other instances of environmental contamination affecting Lodi or its environs. MERLO § 8.24.010(7).

In California (1998); *see also* S.Rep.No. 107-2, at 3. Many initiatives have been instituted by California and the federal government to "expedite the cleanup of these 'Brownfields', and reduce the cost and burden of returning such properties to beneficial use." Bancroft-Whitney § 3.80. Cleanups conducted pursuant to federal and California law have come to achieve some level of predictability, thus allowing for a reasonable estimate of exposure to liability and of the costs involved in taking on a cleanup. *See, e.g.,* Robert P. Dalquist, *Making Sense Of Supelocation Decisions: The Rough Justice Of Negotiated And Litigated Allocations,* 31 Envtl. L. Rep. 11098, 11098-99 (2001). Such certainty, to the extent that it is available, greatly encourages prospective purchasers to rehabilitate contaminated property and put it back into productive use.[18] *See, e.g.,* S.Rep.No. 107-2, at 4.

Moreover, environmental insurance, which was driven from the market by CERCLA's joint and several and retroactive provisions, has recently become available again because evolving case law and more recent state and federal legislation have restored a degree of certainty to exposure to environmental risk. *See, e.g.,* California Center For Land Recycling, *Creating Vibrant Communities: Redeveloping*

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[18] It is important to remember that in many instances there is no solvent responsible party available to pay for site cleanup, and no insurance funds to be tapped. Such sites are often located in inner city neighborhoods, and overly ambitious liability requirements disproportionately discourage economic development in areas that need it most. *See* California Center For Land Recycling, *Strategies For Promoting Brownfield Reuse In California* (1998).

California's Brownfields § 5 (2002); *see also,* Marialuisa S. Gallozzi & Alice V. Stevens, *Introduction To Environmental Risk Policies,* SG006 ALI-ABA 549 (2002). The availability of environmental insurance may allow early settlement, even among large groups of PRP's, thus allowing energy and resources to be directed at site cleanup rather than protracted litigation. *Creating Vibrant Communities* § 5.

To allow literally thousands of different local governments to impose their own liability schemes (such as Lodi's) that make it more difficult to apportion liability than under CERCLA would foster uncertainty and discourage site cleanup. Indeed, Lodi's requirement that a PRP prove by clear and convincing evidence that it caused a divisible portion of the harm is greater than the burden of proof required by CERCLA or HSAA, greater than that normally required in a civil case (preponderance of the evidence), and seems both inefficient and inequitable. If we were to approve Lodi's standard of proof, other California cities could follow, adopting hundreds of different liability schemes all more onerous than CERCLA. The risk of overly strict and uncertain liability would thereby be compounded, thwarting CERCLA's goals.

On the other hand, municipal liability schemes equal to or less onerous than that imposed by CERCLA do not foster uncertainty or discourage cleanup but could, in many instances, make rehabilitation of contaminated property more feasible, thus furthering the objective of Congress.

We hold therefore that MERLO's requirement that a defendant PRP seeking to apportion its liability must demonstrate by clear and convincing evidence that the harm

is divisible is in conflict with CERCLA and is preempted. We reach this conclusion regardless of what determination the district court ultimately makes on the question of whether Lodi is, or is not, a PRP.

(d) The National Contingency Plan ("NCP") Standard

The Insurers next argue that the portions of MERLO dealing with the cleanup standard set forth in the National Contingency Plan ("NCP") conflict with CERCLA § 107(a)(4)(B) and HSAA § 25356, both of which address the NCP. *See* MERLO §§ 8.24.030-040.

Under CERCLA, the cleanup of listed hazardous waste sites must be consistent with the NCP, which is a plan promulgated by the EPA that "specifies the roles" of the federal, state, and local governments "in responding to hazardous waste sites, and establishes the procedures for making cleanup decisions." *United States v. City of Denver,* 100 F.3d 1509, 1511 (10th Cir.1996). Only costs incurred in accordance with the NCP may be recovered under CERCLA. The burden of establishing that the cleanup process is consistent with the NCP depends on whether the plaintiff in a CERCLA action is the government or "any other person": "While the United States government, or a [S]tate or Indian tribe, can obtain 'all costs of removal or remedial action ... *not inconsistent* with the [NCP],' any other person can obtain 'other necessary costs of response ... *consistent with* the [NCP].' " *Wash. State Dept. of Transp. v. Wash. Natural Gas Co.,* 59 F.3d 793, 799 (9th Cir.1995) (quoting 42 U.S.C. § 9607(a)(2), (a)(4)(A)-(B)) (emphasis added). Thus, where "the United States government, a [S]tate, or an Indian tribe is

seeking recovery of response costs, *consistency with the NCP is presumed,*" and the burden is on the defendant to rebut the presumption of consistency by establishing that the plaintiff's response action was arbitrary and capricious. *Id.* (emphasis added). "In contrast, any 'other person' seeking response costs under [CERCLA] *must prove that its actions are consistent with the NCP.*" *Id.* (emphasis added).

HSAA incorporates the NCP standard by reference. Under HSAA, "[a]ny response action taken or approved pursuant to this chapter shall be based upon, and be no less stringent than ... [t]he requirements established under federal regulation pursuant to [the NCP]." Cal. H & S Code § 25356.1.5(a)(1).

The Insurers argue that the provisions of MERLO addressing the NCP are preempted for two reasons. First, the Insurers argue that MERLO conflicts with CERCLA because it permits Lodi to recover from PRPs any "necessary costs of response incurred by the city" that are "*not inconsistent with the requirements of this chapter.*" MERLO § 8.24.040(A)(9)(b) (emphasis added). Thus, MERLO provides for the City a presumption of consistency with cleanup standards. The Insurers allege that even though this provision of MERLO does not specifically reference the NCP,[19] it was

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[19] In fact, the original version of MERLO--Ordinance 1650--specifically stated that Lodi may recover all costs "not inconsistent with the NCP." The Insurers allege that Lodi specifically amended MERLO so that the revised version of the ordinance--Ordinance 1684--omits any reference to the NCP and instead permits the City to recover all costs "not inconsistent with the requirements of this chapter."

crafted to provide Lodi "the identical presumption of consistency with the NCP that CERCLA ... reserve [s] for the United States, States, and Indian Tribes."

We have previously distinguished between local governmental units, such as municipalities, and "States" as defined by CERCLA, 42 U.S.C. § 9607(a)(4)(A). *See Wash. State Dept. of Transp.*, 59 F.3d at 800-01; *United States ex rel. Norton Sound Health Corp. v. Bering Strait School Dist.*, 138 F.3d 1281, 1284 (9th Cir.1998). Whether a municipality standing on its own is entitled to a presumption of consistency with the NCP in the context of cost recovery conducted pursuant to CERCLA is undecided in this circuit.[20] We need not decide this issue today. In this case the Cooperative Agreement between Lodi and the DTSC prominently declares

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According to the Insurers, this amendment "masks rather than eliminates the problem."

20 However, local governments are entitled to the presumption of consistency when performing cleanups pursuant to one of several California code sections. For example, the Polanco Redevelopment Act provides that municipal redevelopment corporations performing cleanups under the provisions of the Act are afforded the presumption of consistency. As the district court in *City of Emeryville v. Elementis Pigments, Inc.*, 2001 WL 964230 (N.D.Cal.), correctly stated, "the [Polanco] Act provides that municipal redevelopment agencies that clean up property under state supervision may recover their costs to the extent that the DTSC could recover under CERCLA. Under CERCLA, state agencies such as the DTSC are considered "states" and are thus eligible to recover under Section 107(a)(4)(A)." *Id.* at *11 (citation omitted).

in several places that the cleanup of the Lodi Groundwater Site shall be conducted in a manner "not inconsistent with the NCP." In the Cooperative Agreement, DTSC has assumed an oversight role[21] and designated the City of Lodi as "the lead enforcement entity." DTSC and Lodi's "joint responsibilities" under the Agreement include ensuring "cost-effective performance of the Work." In essence, the Cooperative Agreement makes the DTSC responsible for ensuring an efficient, reasonable, and cost-effective cleanup. Lodi, acting with DTSC oversight, is therefore entitled to the presumption of consistency under CERCLA afforded to state agencies such as DTSC. *See Wash. State Dept. of Transp.*, 59 F.3d at 800-01 (holding that a state agency is entitled to presumption of consistency under CERCLA § 9607(a)(4)(A)).

Contrary to the Insurers' contentions, this presumption of consistency would not allow Lodi to escape any responsibility it should rightly bear if the district court finds that Lodi is a PRP. Rather, it encourages a more expeditious cleanup by affording Lodi, "acting in close cooperation, coordination and communication with DTSC," the presumption that the cost of selected cleanup mechanisms are recoverable from other PRPs to the extent that other PRPs

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21 As contract interpretation is a matter of law, we interpret the Cooperative Agreement to require DTSC to act with Lodi in a consolidated effort, providing the oversight, consultation, and cooperation necessary and appropriate to ensure that the Lodi Groundwater Site is remediated in a timely, competent, and cost-effective manner. In exchange for its ongoing and substantial services, DTSC will receive the consideration enumerated in the Cooperative Agreement.

are adjudged to be responsible parties. This arrangement should direct energy and resources toward cleaning up the site, rather than toward paying lawyers to build a case for the recoverability of costs. We hold, therefore, that even if Lodi proves to be a PRP, it is entitled to the presumption of consistency with the NCP afforded by the Cooperative Agreement with respect to matters addressed in the Agreement.

Next, the Insurers argue that MERLO is preempted to the extent that it permits Lodi to order remediation that is either more or less stringent than the NCP. Specifically, under MERLO Lodi may order additional or more stringent requirements than those that would or might apply under the NCP. Similarly, MERLO § 8.24.030(A)(6) states that the City "*may order less stringent requirements* " for abatement than those that would or might apply under the NCP. *See* MERLO § 8.24.030(A)(5) (emphasis added). Finally, MERLO states that "at any site within the city which is [a listed site under HSAA], the enforcing officer must, at a minimum, comply with [HSAA]." MERLO § 8.24.030(A)(7).

To the extent that MERLO § 8.24.030(A)(5) permits Lodi to order abatement that is more stringent than the NCP, we find that it is preempted for the same reasons that MERLO's burden of proof is preempted.

As to the claim that MERLO allows abatement less stringent than the NCP, MERLO in fact does not permit Lodi to order abatement less stringent than the NCP with respect to the Lodi Groundwater Site. DTSC listed the Lodi Groundwater Site beginning in fiscal year 1993-94. MERLO requires that listed sites comply with HSAA, which in turn

requires that response actions be based upon and be no less stringent than the NCP.[22] Therefore, as it applies to the Lodi Groundwater Site, MERLO itself requires that response actions be no less stringent than the NCP, hence MERLO does not come into conflict with CERCLA or HSAA on this point.[23]

With respect to application of MERLO beyond the Lodi Groundwater Site, we see no reason why California cities may not enact municipal environmental response ordinances keying cleanup to standards other than the NCP. Cleanups conducted pursuant to CERCLA and HSAA require use of the NCP. However, we have held that CERCLA and HSAA do not preempt the field of hazardous waste cleanup. So long as a local ordinance does not come into conflict with CERCLA or HSAA, as we have explained MERLO would in some instances, a city may borrow or adapt the NCP as it sees fit--or use some other procedure for making cleanup decisions. An agreement with or authorization from the state

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22 MERLO § 8.24.030(A)(7) keys response actions to Cal. H & S § 25356(c), which states that actions carried out with regard to listed sites shall comply "with the procedures, standards, and other requirements set forth in this chapter," which include adherence to the NCP. H & S § 25356(c) has been subsequently renumbered as § 25356(d).

23 The Cooperative Agreement also provides that the Work on the Lodi Groundwater Site comply with the NCP.

is not a prerequisite to local environmental legislation.[24] Local environmental legislation may be particularly useful to California cities in dealing with smaller, marginally contaminated sites that do not attract state or federal involvement, and for which the extensive procedural requirements of the NCP may unnecessarily prolong cleanup and raise its cost. A city may compel a recalcitrant landowner to clean up such a site using standards that make sense under the circumstances.[25] We hold, therefore, that MERLO's

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24 We should note, however, that in some instances California law provides important advantages to municipalities that pursue hazardous waste cleanup under authority delegated by the state with oversight from a state agency. *See, e.g.*, Cal. H & S § 25401 et seq. and § 57008 et seq. (the California Land Environmental Restoration and Reuse Act) (providing statutory immunity for local governments, owners and occupants, and lenders who conduct site cleanup pursuant to the terms of the Act).

25 We are aware of an out-of-circuit case indicating that local regulations less stringent than CERCLA are preempted. However, the statement in *United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1454(6th Cir.1991), that "CERCLA sets only a floor, not a ceiling, for environmental protection" was not essential to the holding, which turned on "the terms of the consent decree [at issue], and not the language of CERCLA." *Id.* at 1455. In any case, it is abundantly clear that local regulation less onerous than CERCLA is not preempted. Indeed, Congress has recognized that "local governments have developed and implemented innovative and effective brownfield programs." S.Rep.No. 107-2, at 2 (2001). The Brownfields Revitalization And Environmental

provisions dealing with cleanup procedures are preempted by CERCLA only to the extent that they permit Lodi to order use of procedures more stringent than the NCP.[26]

Restoration Act of 2001 not only recognizes these programs but specifically recognizes the need to provide federal funding without compelling compliance with some burdensome and needless NCP requirements. *Id.; see also* 42 U.S.C. § 9604(k)(9)(A).

26 Lodi argues that MERLO's provisions allowing it to order abatement procedures more stringent than the NCP can not be preempted by CERCLA because of CERCLA's multiple savings clauses. Lodi's argument does not recognize the difference between field preemption and conflict preemption. We have indeed held that CERCLA's savings clauses make it clear that CERCLA does not preempt the *field* of hazardous waste cleanup. *See* Section III(B)(1) *supra*. As this opinion makes clear, municipalities such as Lodi may exercise significant powers of self-protection in regulating hazardous waste cleanup. However, the powers of municipalities are not unlimited. Where municipal legislation comes into conflict with CERCLA, we find the municipal legislation to be preempted, just as other circuits have found conflict preemption in other circumstances, notwithstanding the same savings clauses cited by Lodi. *See, e.g., Bedford Affiliates,* 156 F.3d at 426-27 (holding application of certain State law remedies was preempted by CERCLA and reasoning that CERCLA "does not expressly preempt state law" but where State or local law "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress," it is preempted); *Reading,* 115 F.3d at 1117 (holding that CERCLA preempted application of certain contribution and

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restitution remedies "because the state law remedies obstruct the intent of Congress ... [by thwarting] the efficient resolution of environmental disputes"); *Sherwin-Williams,* 151 F.3d at 618 (holding that the purpose of CERCLA's savings clauses is "merely to nix an inference that the statute in which [they] appear[ ] is intended to be the exclusive remedy for harms caused by violation of the statute," and holding application of certain provisions of State law preempted by CERCLA).

Lodi also points out that the NCP alludes to standards that are more stringent than federal requirements. First, the context in which "more stringent" requirements occur in the NCP is far removed from concerns at issue in this case.

Second, Lodi cites to sections of the NCP mentioning more stringent State requirements. We have rejected the Insurers' argument that by referring to States but not political subdivisions in the text of CERCLA, Congress intended to leave room for supplemental State legislation but to prohibit all supplemental municipal legislation. However, this does not mean that Lodi can assume the mantle of the "State" or the breadth of the State's powers in all circumstances. We have previously distinguished between local governmental units, such as municipalities, and "States" with regard to various applications of CERCLA. *See Wash. State Dept. of Transp.*, 59 F.3d at 800-01; *Norton Sound,* 138 F.3d at 1284. Our holding here concerns cleanup procedures promulgated by municipalities and other local government entities.

(e) Recovery of Attorney's Fees and Other "Abatement Action Costs"

Under MERLO, Lodi may recover from any PRP "[a]ll *abatement action costs* incurred by the city to undertake, or cause or compel any responsible party to undertake, any abatement action in compliance with the requirements of this chapter...." MERLO § 8.24.040(A)(9)(a) (emphasis added). MERLO defines the phrase "abatement action costs" to include "any and all legal, technical or administrative fees and costs and interest and other costs of financing incurred by the [C]ity in performing or preparing to perform an abatement action." MERLO § 8.24.010(2). Thus, MERLO permits the City to recover any attorney's fees it incurs in the course of its efforts to cleanup the PCE contamination of its soil and groundwater.

In *Key Tronic Corp. v. United States,* 511 U.S. 809, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994), the Supreme Court held that CERCLA § 107(a)(4) does not permit a "*private party* " to recover her attorney's fees. 511 U.S. at 817- 19, 114 S.Ct. 1960 (emphasis added). However, in *United States v. Chapman,* 146 F.3d 1166 (9th Cir.1998), we held that CERCLA § 107(a)(4) permits the United States Government or a State or an Indian tribe to recover all "reasonable attorney fees" "attributable to the litigation as a part of its response costs" if it is the "prevailing party." *Chapman,* 146 F.3d at 1175- 76 (citing *Key Tronic,* 511 U.S. at 813, 819, 114 S.Ct. 1960) (emphasis added).

We need not decide if a city is the "State" for purposes of recovering its attorney fees under CERCLA, because, in any case, a city that is also a PRP should not be able to avail

itself of this advantage. If the district court finds that Lodi is indeed a PRP, it may not legislate for itself a litigation advantage by granting itself the right to collect attorney's fees. If, on the other hand, Lodi proves not to be a PRP, we see no reason why Lodi may not provide for recovery of attorney's fees for itself under its municipal liability scheme. Of course, the amount and nature of attorney's fees recoverable is always subject to the reasonableness standard as applied in the discretion of the district court.

We have held above that Lodi is entitled to the presumption of consistency bestowed on States by the phrase "not inconsistent with the national contingency plan" contained in CERCLA, 42 U.S.C. § 9607(a)(4)(A), by virtue of the Cooperative Agreement with the DTSC. A similar result, however, is not called for with respect to attorney's fees. The ability of states to recover attorney's fees under CERCLA flows from language providing that responsible parties shall be liable to states for "all costs of removal or remedial action." 42 U.S.C. § 9607(a)(4)(A). Attorney's fees recoverable by states are included in the definition of "all costs." *Chapman,* 146 F.3d at 1175. Non-State litigants are, on the other hand, confined to recovery of "necessary costs," which do not include attorney's fees. 42 U.S.C. § 9607(a)(4)(B). Under the peculiar facts of this case, it does not follow from the fact that Lodi is entitled to the presumption of consistency, that it is also entitled to recover "all costs."

Lodi has expended significant attorney's fees in an attempt to escape liability through the enactment and defense of its municipal ordinance. These efforts, so far as we can tell, have not advanced the cleanup of the Lodi Site. Litigation

costs may indeed be a part of recovering funds that are needed to advance the cleanup. However, the ability to recover litigation-related attorney's fees does not necessarily advance the pace of cleanup because it may encourage ambitious litigation. We do not interpret the Cooperative Agreement to allow Lodi to recover its attorney's fees, nor do we necessarily believe that it could bestow on Lodi the right to recover all of its attorney's fees under the circumstances of this case.

Lodi also seeks to recover costs related to a financing scheme upon which it has embarked in order to avoid municipal finance mechanisms that would make Lodi's ratepayers responsible (at least initially) for principal and interest costs. The Insurers assert that Lodi is trying to pass on, as costs of financing the cleanup, interest costs of 25 to 30 percent. We decline to pass judgment on these costs on the record before us, and leave it to the district court to determine if these costs are recoverable under the standard of "necessary costs of response" if Lodi should prove to be a PRP. If Lodi should prove not to be a PRP, we leave it to the district court to determine, under the standards the district court determines to be appropriate, whether these costs are recoverable.

(f) Information Gathering Authority

The Insurers next argue that MERLO's information gathering provision conflicts with both CERCLA and HSAA. Section 8.24.050 authorizes Lodi to compel the production of any documents, information, and testimony:

> . . . for the purposes of investigating the nature or source of . . . an environmental

> nuisance, or for the purposes of determining the need for abatement actions, choosing or taking an abatement action under this chapter, or for the purposes of determining the nature and extent of the assets and financial resources that are or may be available to (or available to provide indemnity or similar benefits to) any potentially responsible parties to undertake abatement actions which are or may be required pursuant to this chapter or to reimburse the comprehensive municipal environmental response fund for any abatement action costs incurred or to be incurred by the city pursuant to this chapter.

MERLO § 8.24.050(A). The Insurers assert that by this section, Lodi has improperly "arrogated to itself" information-gathering powers that only the EPA can provide under CERCLA § 104(e), and only DTSC can provide under HSAA § 25358.1(a).

Notwithstanding any authority that Lodi may acquire by delegation, Lodi has independent authority to promulgate information-gathering legislation pursuant to its traditional police powers. These powers include the City's authority to gather the information reasonably necessary to discharge its duty to protect the public health and welfare from public nuisances. *See* Cal. Gov't Code § 38773.5 (a municipality's legislative body may by Ordinance establish a procedure for the abatement of a nuisance). In addition, California Government Code § 37104 specifically authorizes city councils to issue legislative subpoenas. Lodi's authority to issue legislative subpoenas under MERLO and pursuant to

California Government Code § 37104 was recently reaffirmed by the California Supreme Court. *See Conn. Indem. Co. v. Super. Ct.*, 23 Cal.4th 807, 98 Cal.Rptr.2d 221, 3 P.3d 868 (2000).

Moreover, Lodi's decision to exercise its independent information-gathering authority by enacting MERLO does not conflict with either state or federal law. Compliance with an information-gathering request under MERLO would not make compliance with such a request under CERCLA or HSAA impossible. *See Indus. Truck Ass'n,* 125 F.3d at 1309 (explaining that court will find federal conflict preemption when "it is impossible to comply with both state and federal requirements"). Nor would it "stand as an obstacle to" accomplishing and executing the goals of CERCLA and HSAA. *Id.* (stating that courts will find federal conflict preemption when "state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress"). Finally, permitting Lodi to issue legislative subpoenas does not prohibit conduct expressly authorized by state statute or authorize conduct expressly prohibited by state law. *See Sports Comm. Dist.*, 113 Cal.App.3d at 159, 169 Cal.Rptr. 652.

For these reasons, we find that MERLO's information-gathering provisions are not preempted by either CERCLA or HSAA.

(g) Direct Actions Against Insurers

Under MERLO § 8.24.090(B)(1), Lodi may initiate a direct action against a PRP's insurer *before* the City has obtained a final order or judgment against the insured PRP.

The Insurers allege that this portion of MERLO is preempted because it conflicts with CERCLA § 108(c) and California Insurance Code § 11580. Because we find that MERLO § 8.24.090(B)(1) conflicts with California insurance law and is therefore preempted on this basis, we need not consider whether it also conflicts with CERCLA.

California Insurance Code § 11580 states that every liability insurance policy issued in California must include "[a] provision that *whenever judgment is secured against the insured* ... in an action based upon bodily injury, death, or property damage, *then an action may be brought against the insurer on the policy* and subject to its terms and limitations, by such judgment creditor to recover on the judgment." Cal. Ins.Code § 11580(b)(2) (West 2001) (emphasis added). Fireman's Fund asserts that this statute "forbids direct actions against an insurer absent a final judgment against theinsured." Fireman's Fund further asserts that because MERLO § 8.24.090(B)(1) *authorizes* direct actions against the insurers of PRPs prior to obtaining a final judgment against the insured, but § 11580 *forbids* such actions, MERLO § 8.24.090(B)(1) conflicts with and is therefore preempted by California law. *Sports Comm. Dist.*, 113 Cal.App.3d at 159, 169 Cal.Rptr. 652 (stating that conflict preemption under California law includes situations in which a local statute authorizes conduct prohibited by state law).

We begin our conflict preemption analysis with the plain language of the statute. *See Moyer v. Workmen's Compl. Appeals Bd.*, 10 Cal.3d 222, 230, 110 Cal.Rptr. 144, 514 P.2d 1224 (1973). Contrary to Fireman's Fund's contention, on its face § 11580 neither prohibits direct actions nor purports to set forth the only circumstances under which

one can initiate a direct action against an insurer. It simply *allows* direct actions after the third-party claimant has obtained a final judgment against the insured.

Two California Court of Appeals cases support the conclusion that § 11580 does *not* set forth the exclusive set of circumstances under which one may initiate a direct action against an insurer. *See Roberts v. Home Ins. Indem. Co.*, 48 Cal.App.3d 313, 317-18, 121 Cal.Rptr. 862 (1975) ("[S]ection 11580.... is silent as to a direct action against the insurer before judgment is obtained against the insured. That silence does not imply a legislative policy against allowing a claimant to pursue any rights which may have been created by contract or by another state's direction action statute."); *Turner v. Evers,* 107 Cal.Rptr. 390, 31 Cal.App.3d Supp. 11, 22 (1973) ("[S]ection 11580, subdivision (b), is a statement of the minimum provisions that must be included in all liability insurance policies issued in this state.").

However, there is greater authority to suggest that § 11580 sets forth the exclusive set of circumstances under which a third-party claimant may directly sue another policyholder's liability insurer. *See McKee v. Nat'l Union Fire Ins. Co.*, 15 Cal.App.4th 282, 286-87, 19 Cal.Rptr.2d 286 (1993); *Nationwide Ins. Co. v. Super. Court,* 128 Cal.App.3d 711, 180 Cal.Rptr. 464, 466 (1982) (noting "the general rule of indemnity law that ' [w]here the terms of the indemnity contract, or law of the state, require a judgment against the ... [indemnitee] before direct action against the insurer, no liability accrues as an enforceable claim against the insurer until recovery of a final judgment against [the indemnitee].' "); *Zahn v. Canadian Indem. Co.*, 57 Cal.App.3d 509, 129 Cal.Rptr. 286, 288 (1976) ("It is

fundamental that generally speaking the injured party may not directly sue an insurer of the alleged tortfeasor."); *see also Tashire v. State Farm Fire & Cas. Co.*, 363 F.2d 7, 10 (9th Cir.1966), *rev'd on other grounds,*386 U.S. 523, 87 S.Ct. 1199, 18 L.Ed.2d 270 (1967) (stating that "under the law of California ... a direct action against the insurer is not allowable until after the claimant shall have secured a final judgment against the insured"); *Laguna Publ'g Co. v. Employers Reinsurance Corp.*, 617 F.Supp. 271, 272 (C.D.Cal.1985) (quoting *Tashire*).

We find these latter cases (including our own Ninth Circuit decision) persuasive and hold that MERLO § 8.24.090(B)(1) is preempted by California Insurance Code § 11580 to the extent that it expands the ability of Lodi to bring direct actions against a PRP's insurer before entry of a final judgment against the insured.

3. Duplication

California courts have largely confined the duplication prong of the state preemption test to penal ordinances. *Baldwin v. County of Tehama,* 31 Cal.App.4th 166, 36 Cal.Rptr.2d 886, 894 (1994). The "reason that a conflict with the general laws under article XI, section 7 of the state Constitution is said to exist where an ordinance duplicates state law is that a conviction under the ordinance will operate to bar prosecution under state law for the same offense." *Cohen v. Bd. of Supervisors,* 40 Cal.3d 277, 219 Cal.Rptr. 467, 475 n. 12, 707 P.2d 840 (1985). No such situation exists here. Furthermore, California courts find preemption by duplication only where the ordinance is "coextensive with state law." *Suter v. City of Lafayette,* 57 Cal.App.4th 1109,

67 Cal.Rptr.2d 420, 428 (1997). MERLO treats the same subject as covered by state hazardous waste laws. It is however hardly co- extensive with HSAA. We find no preemption by duplication.

4. Summary of Preemption Analysis

In sum, we hold that CERCLA and HSAA do not preempt the field of hazardous waste remediation, either explicitly or by implication. CERCLA permits both states and their political subdivisions to enact hazardous waste regulations and pursue additional remedies, as long as those remedies do not conflict or interfere with "the accomplishment and execution of [CERCLA's] full purpose and objective." *Indus. Truck Ass'n,* 125 F.3d at 1309. We also hold that MERLO is not preempted by the state law doctrine of preemption by duplication.

We conclude, however, that two provisions of MERLO--regarding the burden of proof for PRPs for establishing a defense to liability and that allow Lodi to require abatement procedures more stringent than the NCP--are preempted under the doctrine of conflict preemption. We further find that the sections of MERLO allowing Lodi to impose joint and several liability on other PRPs and to recover attorneys' fees may be preempted under the doctrine of conflict preemption if the district court finds that Lodi is a PRP. To the extent that MERLO protects Lodi from contribution claims by other PRPs, MERLO is also preempted if the district court finds that Lodi is a PRP (again, we express no opinion on whether Lodi is afforded protection from contribution by the Cooperative Agreement). The section of MERLO allowing direct actions against Insurers is

preempted by California insurance law. Because we find that the "invalid provisions are easily severable from the remainder of the ordinance," the balance of MERLO--including its provisions regarding natural resource damages, provisions that allow abatement procedures less stringent than the NCP, and provisions that concern information-gathering--remain viable and are not preempted by either state or federal law, regardless of whether the district court finds that Lodi is a PRP. *Cohen,* 219 Cal.Rptr. at 476, 707 P.2d 840.

C. OFFICIAL CAPACITY CLAIM

Fireman's Fund also appeals the district court's decision dismissing its claims brought against three individual defendants in their "official capacities": Lodi City Attorney Randall A. Hays, Enforcement Officer Richard C. Prima. Jr., and Enforcement Officer Fran E. Forkas.[27]

The district court dismissed these claims as duplicative of Fireman's Fund's claims against Lodi. Fireman's Fund asserts that the district court erred in so doing because the above-named municipal officers "are classic *Ex [P]arte Young* defendants" and the official capacity claims are necessary to "effectively foreclose any assertion by Lodi of Eleventh

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[27] Fireman's Fund does not appeal the district court's dismissal of Fireman's Fund's official capacity claims against Michael C. Donovan and the Law Firm of Zevnik, Horton, Guibord & McGovern, L.L.P.

Amendment Immunity."[28] We agree with Fireman's Fund and reinstate the official capacity claims against Hays, Prima, and Forkas.[29]

IV.
CONCLUSION

In sum, we hold that the district court erred in abstaining from reaching Fireman's Fund's state law preemption claim. On the merits of the Insurers' state and federal preemption claims, we hold that CERCLA and HSAA do not preempt the field of hazardous waste remediation, eitherexplicitly or by implication. We further hold that MERLO is not preempted by the state law doctrine of

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28 "The Eleventh Amendment bars suits which seek either damages or injunctive relief against a state, an 'arm of the state,' its instrumentalities, or its agencies." *Franceschi v. Schwartz,* 57 F.3d 828, 831 (9th Cir.1995). However, under *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), "the Eleventh Amendment does not bar actions seeking only prospective declaratory or injunctive relief against state officers in their official capacities." *Los Angeles County Bar Assoc. v. Eu,* 979 F.2d 697, 704 (9th Cir.1992).

29 Lodi asserts that the official capacity claims against these three municipal officers were also dismissed by the district court on qualified immunity grounds. On the contrary, the district court dismissed the *official capacity claims* as duplicative of the claims against the City, and dismissed the "remaining *individual capacity claims* " on qualified immunity grounds. *Fireman's Fund,* 41 F.Supp.2d at 1106 (emphasis added).

preemption by duplication.

We conclude, however, that several sections of MERLO are preempted by state and federal law under the doctrine of conflict preemption under the circumstances we have outlined above. We conclude that the balance of MERLO remains viable and is not preempted by either state or federal law. Finally, we reinstate Fireman's Fund's official capacity claims against Hays, Prima, and Forkas.

For the foregoing reasons, we AFFIRM IN PART, REVERSE IN PART, and REMAND for further proceedings consistent with this opinion and with instructions to the district court to determine if Lodi is a PRP.[30] Each party is to bear its own costs.

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30 Fireman's Fund and Unigard argue that Lodi is a PRP as a matter of law as a result of its agreement with the DTSC. This issue has not been fully briefed on appeal and we leave it to the district court to consider this argument in the first instance.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

[Filed February 25, 1999]

No. CIV. S-98-1489 FCD/JFM

Fireman's Fund Insurance Co.,	)
	)
Plaintiff.	)
	)
v.	)
	)
CITY OF LODI, ET AL.	)
	)
Defendant.	)
	)

MEMORANDUM AND ORDER

DAMRELL, District Judge.

In response to an ordinance adopted by the City of Lodi, California (the "City"), plaintiff Fireman's Fund Insurance Company ("Fireman's Fund") brings suit against the City; Mayor Jack Sieglock in his official capacity; Enforcement Officers Richard C. Prima, Jr., and Fran E. Forkas in their official capacities; City Attorney Randall A.

Hays in his official and individual capacities; and Michael C. Donovan and Zevnik Horton Guibord & McGovern, LLP (collectively, the "Firm"), private attorneys acting as assistant city attorneys for Lodi, in their official and individual capacities.[1] Fireman's Fund alleges that the City's Comprehensive Municipal Environmental Response and Liability Ordinance (the "Ordinance") is preempted by federal and state law and violates the United States Constitution and the California State Constitution. Specifically, Fireman's Fund alleges that the Ordinance is preempted by the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, and the California Hazardous Substance Account Act (HSAA), Cal. Health & Safety Code § 25300 *et seq.*, and that the Ordinance violates Fireman's Fund's rights secured by the Due Process Clause of the United States Constitution, and the Equal Protection and Contract Clauses of the United States and California State Constitutions.

This matter comes before the court on Fireman's Funds' motion for partial summary judgment and permanent injunction and defendants' motions to dismiss.[2] The parties were heard at extended oral argument on December 4, 1998. Having reviewed the numerous filings and exhaustive

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1 Defendants Adam L. Babich, Bret A. Stone, Steven H. Doto, and John R. Till were dismissed without prejudice by stipulation of the parties. *See* Stip. & Order filed 9/28/98.

2 Plaintiff filed a motion for preliminary injunction on August 24, 1998. Plaintiff's motion for partial summary judgment and permanent injunction supercedes the motion for preliminary injunction.

arguments, the court finds that the individual defendants and the Firm are immune from suit, that CERCLA does not preempt the Ordinance, and that the court should abstain from consideration of whether the ordinance is preempted by the HSAA. Accordingly, Fireman's Fund's motion for partial summary judgment and permanent injunction is denied, the individual defendants', the Firm, and the first cause of action are dismissed, and the second through sixth causes of action are dismissed without prejudice.

PRELIMINARY RULINGS

At the December 4 hearing, the court took judicial notice of the remedial provisions of the municipal codes of San Francisco, Los Angeles, Chicago, and New York City; California Health and Safety Code sections; the imminent expiration of HSAA provisions; and the Order of the San Joaquin Superior Court. Fireman's Fund's response to the requests was noted.

The court also accepted the amici briefs filed by the American Insurance Association and Insurance Environmental Litigation Association. Responses to the briefs were noted.

Despite the parties' excessive use of proffers and corrections, the court accepted them. Fireman's Fund's protest was noted.

STANDARD

1. Summary Judgment

Summary judgment is appropriate if the record, read

in the light most favorable to the non-moving party, demonstrates no genuine issue of material fact. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Material facts are those necessary to the proof or defense of a claim, and are determined by reference to the substantive law. *See Anderson v. Liberty Lobby,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex,* 477 U.S. at 322-23, 106 S.Ct. 2548. Moreover, "[a] summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data." *Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir.1989).

2. Dismissal

A complaint will not be dismissed under Federal Rule of Civil Procedure 12(b)(6), "unless it appears beyond doubt that [a] plaintiff can prove no set of facts in support of [its] claim that would entitle [it] to relief." *Yamaguchi v. Department of Air Force,* 109 F.3d 1475, 1480 (9th Cir.1997) (quoting *Lewis v. Telephone Employees Credit Union,* 87 F.3d 1537, 1545 (9th Cir.1996)). "All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Cahill v. Liberty Mut. Ins. Co.,* 80 F.3d 336, 337-38 (9th Cir.1996).

BACKGROUND

1. Factual Background[3]

In April 1989 the City detected tetrachloroethene (PCE) in a water sample from a new water tank. Subsequent testing found PCE contamination in the groundwater and several City water wells. In March 1992 the Central Valley Regional Water Quality Control Board (RWQCB) issued a report identifying a cleaning business insured by Fireman's Fund as one potential source of PCE contaminated wastewater discharged into the City's sewer lines and suspected as the source of the soil and groundwater contamination.

In 1993 the California State Department of Toxic Substance Control (DTSC) began its investigation of the contamination. In 1994 DTSC began an administrative action against selected potentially responsible parties, including the City, to address the soil and groundwater contamination.

The City retained Zevnik Horton Guibord & McGovern, LLP, a private law firm, in or about January 1997. At that time, the City also began a series of requests to the regional and headquarter levels of the Environmental Protection Agency (EPA) seeking a delegation of information gathering authority under CERCLA. The EPA twice denied the request.

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[3] The Factual Background is drawn from plaintiff's Complaint, ¶¶ 10-41.

On April 16, 1997, the City adopted Ordinance No. 1647 declaring any unpermitted or unregulated presence of a hazardous substance in the environment a nuisance. At a meeting on May 6, 1997, Lodi's City Council authorized the City Manager to execute a "Comprehensive Joint Cooperative Agreement" ("Agreement") with the DTSC concerning the investigation and abatement of hazardous substance contamination in and affecting the City. On August 6, 1997, the City Council adopted the Ordinance that gives rise to this action. The Ordinance, modeled on CERCLA and the HSAA, declares certain conditions, releases, and processes to be "public nuisances."

The City issued Notices of Endangerment, in accordance with the Federal Resource Conservation and Recovery Act, 42 U.S.C. § 6972(b)(2)(A), to potentially responsible parties in June 1997. The notices stated that these potentially responsible parties (PRP) were jointly and severally liable for investigation and remediation costs and that the City intended to commence a civil or administrative action against them unless they settled the claim. Enclosed with the notice was a settlement form releasing the PRP from further liability if he or she would pay an amount equal to its insurance policy limits. If an insurer was unwilling to authorize a policy limits settlement, the PRP could enter into a stipulated settlement in which the City agreed not to execute any judgment that might be obtained on any asset "except the remaining insurance policies issued by the non-settling insurer."

The City entered a proposed settlement agreement with a party to whom it sent an Abatement Action Order. Following the settlement, the City filed a civil complaint and

"Proposed Final Consent Decree, Final Order and Final Judgment" in the Eastern District of California seeking judgment in the amount of one-million dollars. The matter is pending.

The City has issued two "Information Gathering Demands" to insurers pursuant to the Ordinance. When their demands were refused, the City filed criminal misdemeanor complaints against the insurers seeking sanctions for their failure to respond. The insurers filed demurrers which were granted, and the cases were dismissed. The City then filed civil complaints against the insurers seeking mandatory and permanent injunctive relief and ordering the insurers to comply with the demands. These actions are pending.

2. Procedural Background

On August 6, 1998, Fireman's Fund filed its complaint alleging that the City's adoption of the Ordinance (1) violated the Supremacy Clause of the United States Constitution; (2) violated Article 11, Section 7 of the California State Constitution; (3) violated Fireman's Fund's procedural due process rights secured by the Fourteenth Amendment; (4) violated Fireman's Fund's substantive due process rights secured by the Fourteenth Amendment and Article 1, Section 7 of the California State Constitution; (5) impaired Fireman's Fund's right to contract secured by Article 1, Section 10, Clause 1 of the United States Constitution and Article 1, Section 9 of the State Constitution; and (6) denied Fireman's Fund equal protection under the Fourteenth Amendment and Article 1, Section 7 of the California State Constitution.

On August 24, 1998, Fireman's Fund moved for a preliminary injunction. On September 21, 1998, while the preliminary injunction motion was pending, defendants Doto, Stone, Till, Donovan, Babich, and the Firm moved to dismiss and to strike.[4] Also on September 21, 1998, the City and its officers moved to dismiss the complaint.

On October 16, 1998, Fireman's Fund filed a motion for partial summary judgment and permanent injunction.

After extensive briefing by the parties in support of and opposition to the motions, the court held a hearing on December 4, 1998.

ANALYSIS

1. Individual Defendants and the Firm

Fireman's Fund brings suit against defendants Sieglock, Prima, and Forkas in their official capacities and defendants Hays, Donovan, and the Firm in their official and individual capacities. Defendants argue that the official capacity suits are duplicative of the claims against the City and that they are immune from suit in their individual capacities.

A. Official Capacity Suits

A claim against a municipal officer in an official

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[4] Defendants Doto, Till, Stone, and Babich were dismissed by stipulation of the parties. *See* Order dated 9/21/98.

capacity is tantamount to a claim against the entity; it has the same effect as a suit directly against the city. *See Hafer v. Melo,* 502 U.S. 21, 24, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991); *Busby v. City of Orlando,* 931 F.2d 764, 776 (11th Cir.1991). Thus, the claims against Sieglock, Prima, Forcas, Hays, Donovan, and the Firm in their official capacities are redundant.

B. Qualified Immunity

The remaining individual capacity claims against defendants Hays, Donovan, and the Firm must be dismissed because the defendants are entitled to qualified immunity. Government officials performing discretionary functions are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory rights of which a reasonable person would have known."[5] *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Qualified immunity is not merely an immunity to liability, but immunity from suit itself. *See Babb v. Dorman,* 33 F.3d 472, 477 (5th Cir.1994).

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5 In the instant action, defendant Hays is the City Attorney; defendants Donovan and the Firm were retained by the City and made assistant city attorneys. As retained counsel, Donovan and the Firm may assert qualified immunity to the same extent as any city official. *See Cullinan v. Abramson,* 128 F.3d 301, 310 (6th Cir.1997), *cert. denied,* 523 U.S. 1094, 118 S.Ct. 1560, 140 L.Ed.2d 792 (1998) ("[T]he rationales for qualified immunity apply to [private] lawyers and their firm in about the same way they apply to [the government attorney]").

In the Ninth Circuit, a two-part test determines the scope of qualified immunity for governmental officials. First, the court must determine whether the law governing the officials' conduct was clearly established at the time the officials acted. If the law was not clearly established, qualified immunity applies. If the law was clearly established, the court must determine whether reasonable officials would have believed that their actions were lawful. If the court so finds, the officials are entitled to qualified immunity. *See Somers v. Thurman,* 109 F.3d 614, 616-17 (9th Cir.1997), *cert. denied,* 522 U.S. 852, 118 S.Ct. 143, 139 L.Ed.2d 90 (1997); *Act Up!/ Portland v. Bagley,* 988 F.2d 868, 871 (9th Cir.1993).

For a federal right to be clearly established at the time of the defendant's alleged conduct:

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he's doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law that unlawfulness must be apparent.
>
> *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (citations omitted). The threshold determination of whether the law governing the conduct at issue is clearly established is a question of law for the court. *See Harlow,*

> 457 U.S. at 818, 102 S.Ct. 2727. Fireman's Fund bears the burden of showing that the constitutional right at issue was clearly established at the time of defendants' conduct. *See Baker v. Racansky,* 887 F.2d 183, 186 (9th Cir. 1989). A determination of reasonableness, although it may require consideration of factual issues, is appropriate for summary judgment if the facts are undisputed. *See Act Up!/ Portland v. Bagley,* 988 F.2d at 872.

It is clearly established that defendants are not entitled to enforce unconstitutional statutes so as to deprive plaintiffs of their rights. It is not at all clear, however, that a reasonable attorney would have known that the Ordinance was unconstitutional. The complexity of the issues presented to this court and the amount of briefing submitted in support of and opposition to the motions belies the argument that a reasonable attorney would have recognized the unconstitutionality of the Ordinance. Defendants Hays, Donovan, and the Firm are entitled to qualified immunity.

Accordingly, defendants Sieglock, Prima, Forkas, Hays, Donovan, and the Firm are dismissed.

2. Ripeness

Defendants argue that Fireman's Fund's claims are not yet ripe for adjudication and are properly dismissed. In determining whether plaintiff's claims are ripe, the court considers (1) whether the issues are fit for judicial decision, and (2) whether the parties will suffer hardship if the court

declines to consider the issues. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 201, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983).

In the instant case, the court finds the issues fit for judicial decision. The issues do not require further factual development: the content of the Ordinance is clear as are the City's intentions to enforce the Ordinance so as to maximize its recovery of the insurance assets of potentially responsible parties. As the Supreme Court has explained, a constitutional challenge to an economic loss attributable to legislation can be ripe even where significant steps remain before the transaction at issue actually takes place. *See Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 143, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974).

3. Standing

Fireman's Fund bears the burden of establishing its standing to sue. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Defendants argue that Fireman's Fund cannot meet that burden because there has been no "injury-in-fact" to plaintiff's legally protected interest. *See Sierra Club v. Morton,* 405 U.S. 727, 740, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) (emphasizing that complaint must establish that plaintiff has "direct stake in the outcome" of lawsuit such that decision will resolve concrete dispute to show injury-in-fact).

Fireman's Fund has alleged a direct threat sufficient to confer standing. The City's unconcealed plan to target insurers like Fireman's Fund demonstrates the imminence of the threat. "The mere existence of a statute, which may or

may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III." *San Diego County Gun Rights Comm. v. Reno,* 98 F.3d 1121, 1126 (9th Cir.1996) (citation omitted). However, "[b]ecause it is clear to whom these provisions of the [Ordinance] would be applied were they to be applied at all, the imminent threat of such prosecutions can be deemed speculative only if it is likely that the government may simply decline to enforce these provisions at all." *Navegar, Inc. v. United States,* 103 F.3d 994, 1000 (D.C.Cir.1997). The City's intent to enforce the Ordinance against insurers is not speculative.

In this case four factors are indicative of an actual controversy despite the absence of a specific threat: (1) the highly specific provisions of the Ordinance and their applicability to Fireman's Fund; (2) the Ordinance's recent enactment (as opposed to a statute that "has lain moribund for years"); (3) the enforcement of the Ordinance against parties whose status under the law is identical to plaintiff's; and (4) indications that the Ordinance will be enforced in the future. *See Seattle Sch. Dist. No. 1 v. Washington,* 633 F.2d 1338, 1342 (9th Cir.1980). More than a general threat of enforcement faces plaintiff. Fireman's Fund has "suffered an 'injury-in-fact' to a legally protected interest that is both 'concrete and particularized' and 'actual and imminent' as opposed to 'conjectural' or 'hypothetical.' " *San Diego County,* 98 F.3d at 1126. "One does not have to await the consummation of threatened injury to obtain preventative relief. If the injury is certainly impending, that is enough." *Blanchette,* 419 U.S. at 143, 95 S.Ct. 335 (citation omitted).

4. Federal Preemption

The Supremacy Clause of the Constitution, Art. VI, cl. 2, invalidates state laws that "interfere with, or are contrary to the laws of [C]ongress, made in pursuance of the [C]onstitution." *Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. 597, 604, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991) (quoting *Gibbons v. Ogden,* 22 U.S. (9 Wheat) 1, 211, 6 L.Ed. 23 (1824)). Federal law preempts state law explicitly if the language of the federal statute reveals an express congressional intent to do so. *Barnett Bank of Marion County v. Nelson,* 517 U.S. 25, 31, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996). In the absence of such explicit statutory language, there are two ways of finding preemption by implication: "field preemption" and "conflict preemption." Field preemption occurs "where the federal scheme of regulation is so pervasive that Congress must have intended to leave no room for the States to supplement it." *United States v. City and County of Denver,* 100 F.3d 1509, 1512 (1996) (citing *Barnett Bank,* 517 U.S. at 31, 116 S.Ct. 1103).

> Congress' intent to supersede state law in a given area may nonetheless be implicit if a scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," if "the Act of Congress ... touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or if the goals "sought to be obtained" and the "obligations imposed" reveal a purpose to preclude state authority.

Mortier, 501 U.S. at 605, 111 S.Ct. 2476 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). Conflict preemption occurs when Congress has not chosen to occupy a particular field, but federal and state law conflict. "Such a conflict arises when compliance with both federal and state regulations is a physical impossibility or when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Mortier,* 501 U.S. at 605, 111 S.Ct. 2476 (citations and quotation marks omitted).

Federal preemption of state law is not favored, especially in areas of law traditionally dominated by the individual states. When considering the preemptive effect of a federal statute, the court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless it was the clear and manifest purpose of Congress." *Rice,* 331 U.S. at 230, 67 S.Ct. 1146; *see English v. General Elec. Co.*, 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). For the purposes of this preemption analysis, the court analyzes the constitutionality of a local ordinance and a statewide law in the same way. *Mortier,* 501 U.S. at 605, 111 S.Ct. 2476.

A. Explicit Preemption

In enacting CERCLA, Congress did not explicitly preempt all state environmental laws. *See, e.g., Bedford Affiliates v. Sills,* 156 F.3d 416, 426 (2d Cir.1998); *Witco Corp. v. Beekhuis,* 38 F.3d 682, 687 (3d Cir.1994); *United States v. Akzo Coatings of Am., Inc.,* 949 F.2d 1409, 1455 (6th Cir.1991); *see also City and County of Denver,* 100 F.3d at 1512 (implicitly finding that language of CERCLA reveals

no express congressional intent to preempt state law). Fireman's Fund does not argue otherwise.

B. Field Preemption

Fireman's Fund argues that the Ordinance illegitimately seeks to assert the City's authority in an area completely occupied by CERCLA and California's HSAA. Plaintiff contends that CERCLA authorizes only states to impose additional requirements and that California has used its authority to implement the HSAA. According to Fireman's Fund, CERCLA granted no such authority to subdivisions of states or municipalities. It is undisputed that neither the EPA nor the HSAA delegated any powers to the City, and that the only power delegated to the City through its settlement with the DTSC was a limited power to gather information, not exercise the powers granted by the HSAA. According to Fireman's Fund, the court should draw the conclusion that the federal-state scheme created by CERCLA and HSAA occupies the field. The court disagrees.

CERCLA is not so comprehensive a scheme of regulation that it provides no room for supplementation by the states. *See, e.g., Bedford Affiliates,* 156 F.3d at 426-27; *Witco Corp.,* 38 F.3d at 687; *Akzo Coatings,* 949 F.2d at 1455; *see also City and County of Denver,* 100 F.3d at 1512 (implicitly finding that CERCLA does not preempt the field). CERCLA states: "Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to release of hazardous substances within the State." 42 U.S.C. § 9614(a). Congress clearly intended that CERCLA would not occupy the field and anticipated state statutes and regulations

imposing additional liability and requirements tailored to the needs of smaller jurisdictions. Fireman's Fund does not dispute that CERCLA alone does not occupy the field; Fireman's Fund argues that CERCLA plus California's HSAA equals occupation of the field, leaving the City no room in which to legislate.

The crucial question in this field preemption analysis is whether the term "States" can be read broadly enough to encompass municipalities. Based on this court's reading of *Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. 597, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991), CERCLA's failure to specifically identify municipalities in § 9614(a) is not significant. As the Supreme Court stated in *Mortier* in construing the regulatory authority granted to "States" by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), "[t]he exclusion of political subdivisions cannot be inferred from the express authorization to the 'State[s]' because political subdivisions are components of the very entity the statute empowers." *Mortier,* 501 U.S. at 608, 111 S.Ct. 2476. "Mere silence, in this context, cannot suffice to establish a 'clear and manifest purpose' to pre-empt local authority." *Id.* at 607, 111 S.Ct. 2476. Because "[t]he term 'state' is not self-limiting since political subdivisions are merely subordinate components of the whole," in order to find field preemption, the court would have to find that states could not redelegate the authority granted to them under CERCLA to their political subdivisions "either specifically or by leaving undisturbed their existing statutes that would otherwise provide local government with ample authority to regulate." *Id.* at 612, 111 S.Ct. 2476. Moreover, the Supreme Court found:

> Even if FIFRA's express grant of regulatory authority to the States could not be read as applying to municipalities, it would not follow that municipalities were left with no regulatory authority. Rather, it would mean that localities could not claim the regulatory authority explicitly conferred upon the States that might otherwise have been pre-empted through actual conflicts with federai law.

Id. Having found that the word "states" does not exclude municipalities, the court does not find that CERCLA precludes states from explicitly or implicitly redelegating their authority to their political subdivisions. Moreover, field preemption cannot be inferred from CERCLA. Section 9614(a) quoted above clearly anticipates that states (and municipalities) will adopt environmental regulations. This language allowing states (and municipalities) to adopt more stringent environmental regulations would be surplusage if Congress had intended to occupy the entire field of hazardous waste cleanup. The court finds the Supreme Court's reasoning in *Mortier* equally applicable to CERCLA.[6]

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[6] In *City and County of Denver*, 100 F.3d at 1513, the Tenth Circuit declined to apply *Mortier* when to do so would impede CERCLA's objective of promoting prompt and efficient remediation of hazardous waste sites. As discussed below, application of *Mortier* in the instant case would not impede CERCLA's overall objective. The Tenth Circuit's reasoning for refusing to apply *Mortier* to CERCLA does not hold in this case.

Arguing in favor of field preemption, Fireman's Fund cites three cases: *Town of New Windsor v. Tesa Tuck, Inc.*, 919 F.Supp. 662 (S.D.N.Y.1996); *Borough of Sayreville v. Union Carbide Corp.*, 923 F.Supp. 671 (D.N.J.1996); and *Washington State Dep't of Transp. v. Washington Natural Gas Co.*, 59 F.3d 793 (9th Cir.1995). These cases are not persuasive. *Town of New Windsor* holds that a municipality is not a "government plaintiff" for purposes of cost recovery actions brought pursuant to CERCLA. *See* 919 F.Supp. at 681-82 (holding that municipality is not "state" for purposes of § 107(a)(4)(A) of CERCLA, 42 U.S.C. § 9607(a)(4)(A)). However, that limited definition of "state" is not applicable in all instances. In *Town of New Windsor,* the district court acknowledged that "policy considerations, such as facilitating settlement," might justify treating a municipality as a "state" under CERCLA. *Id.* at 682 & n. 22. In the instant case, prompt and efficient remediation of a hazardous waste site is the policy consideration justifying the expansive definition of "state."

In *Borough of Sayreville,* the district court held that a municipality is not an authorized representative of a state for purposes of bringing an action for natural resource damages recovery under CERCLA unless the municipality has been specifically appointed by the governor of the state. 923 F.Supp. at 680-81. Section 104(a)(4)(C) permits only "[t]he President, or the authorized representative of any State" to bring suit on behalf of the public for damages to natural resources. 42 U.S.C. § 9607(f)(1). It is axiomatic that the "authorized representative of any State" must be appointed by the governor of that state, and that a municipality, by its own initiative, cannot become the authorized representative of its state. *Borough of Sayreville* does not support the notion that

a municipality cannot be treated as a state for purposes of CERCLA's other provisions.

Finally, Fireman's Fund relies on the Ninth Circuit's decision in *Washington State* to support its contention that a municipality cannot be a state under CERCLA. In fact, *Washington State* holds only that state administrative departments and agencies are within CERCLA's definition of state. 59 F.3d at 800. The Ninth Circuit did not hold that municipalities fall outside the definition of a state. On the question of whether a municipality is a state for purposes of CERCLA, the court stated:

> Some courts have concluded that the definition of "State" does not include political subdivisions such as municipalities. These cases are not relevant to the issue before us today. A municipality, a local government with authority over a limited area, is a different type of government unit than a state-wide agency that is part of the organized government of the state itself. Our discussion is limited to whether the definition of "State" encompasses the latter.

Id. at 800 n. 5 (citation omitted).

CERCLA does not preempt the field. Congress clearly intended states to enact hazardous waste regulations, and that grant of authority to states encompasses municipalities.

C. Conflict Preemption

Fireman's Fund asserts that the Ordinance conflicts with CERCLA in six respects: (1) the apportionment of liability and allocation of costs; (2) the allowance of direct actions against insurers; (3) the presumption of consistency with federal clean-up procedures; (4) the recovery of natural resource damages; (5) the power to gather information and documents; and (6) the standard of proof for liability. As described above, conflict preemption occurs when "it is impossible to comply with both federal and state laws, or the state law stands as an obstacle to the accomplishment of Congress's objectives." *City and County of Denver*, 100 F.3d at 1512. Neither circumstance is present in this case.

A quintessential example of conflict preemption due to physical impossibility is found in *United States v. City and County of Denver*. Denver had a local zoning ordinance that directly conflicted with a remedial order issued by the Environmental Protection Agency; the remedial order required on-site solidification of contaminated soils, but Denver's zoning ordinances prohibited the owner from maintaining hazardous waste in areas zoned for industrial use. The owner could not obey both the EPA's remedial order and the cease and desist order issued by Denver. This is conflict preemption, and the district court and Tenth Circuit Court of Appeal so found. *Id.* at 1512-13.

The circumstances in this case are not analogous. The Ordinance is not in actual conflict with CERCLA as to any of the six areas identified by Fireman's Fund. Placed side by side, the Ordinance and CERCLA differ but it is not physically impossible for Fireman's Fund to comply with the

provisions of CERCLA and the provisions of the Ordinance. Moreover, no agency, federal or state, is enforcing CERCLA's provisions in this hazardous waste cleanup effort, nor has Fireman's Fund identified any provision of CERCLA with which it must comply pursuant to any order or request of any federal or state agency. Therefore, Fireman's Fund need not choose between compliance with CERCLA and compliance with the Ordinance.

Nor does the Ordinance stand as an obstacle to the prompt and efficient remediation of hazardous waste sites. To the contrary, the Ordinance seeks to efficiently collect funds with which the City can institute hazardous waste cleanup. The Ordinance differs from CERCLA in several respects but it is consistent with the overall objectives of CERCLA. Moreover, CERCLA anticipates the promulgation of non-federal hazardous waste statutes and regulations. Municipal regulations cannot be said to thwart Congress's intent to create uniform national hazardous waste legislation where no such congressional intent is apparent. The court does not find that the Ordinance is an obstacle to accomplishment of Congress's goal in enacting CERCLA.

5. State Preemption

Plaintiff asks this court to determine whether "the city ordinance is preempted by state law[,] ... a sensitive and complex issue involving the distribution of power between the state and local governments." *Cedar Shake and Shingle Bureau v. City of L.A.*, 997 F.2d 620, 622 (9th Cir.1993). Preliminary to any decision on the merits, this court must consider the wisdom of exercising jurisdiction over the state preemption issue. Three factors must be present before

abstention is allowed under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941):

> (1) the complaint must involve a "sensitive area of social policy" that is best left to the states to address; (2) "a definitive ruling on the state issues by a state court could obviate the need for constitutional adjudication by the state court"; and (3) "the proper resolution of the potentially determinative state law issue is uncertain."

Cedar Shake and Shingle, 997 F.2d at 622 (citing *Kollsman v. City of L.A.*, 737 F.2d 830, 833 (9th Cir.1984)). All three factors are present in the instant case.

First, the preemption question requires the interpretation of a local ordinance which enables the City to pay for hazardous waste remediation it otherwise could not afford. This is an area of serious local concern about which the DTSC has expressed no opinion and into which federal intrusion is undesirable.

Second, the resolution of the preemption question would avert the need for this court to make a constitutional ruling. If a state court determines that the local ordinance is preempted by the HSAA, the ordinance would be void, and a federal court would not have to decide Fireman's Fund's Due Process, Equal Protection, and Contract Clause claims.

Third, the resolution of the preemption question is unclear. Article XI, section 7 of the California State

Constitution provides that municipalities may make and enforce ordinances "not in conflict with general laws." An ordinance in conflict with general laws is void.

> Conflicts exist if the ordinance duplicates, contracts, or enters an area fully occupied by general law, either expressly or by legislative implication. If the subject matter or field of the legislation has been fully occupied by the state, there is no room for supplementary or complementary local legislation, even if the subject [was] otherwise one properly characterized as "a municipal affair."

Cedar Shake and Shingle, 997 F.2d at 623 (quoting *Cohen v. Board of Supervisors*, 40 Cal.3d 277, 219 Cal.Rptr. 467, 474, 707 P.2d 840 (1985) (citations omitted)). The California Supreme Court has determined that the HSAA does not preempt local zoning ordinances forcing hazardous waste disposal facilities to remove waste from areas designated by land use permits. *IT Corp. v. Solano County Bd. of Supervisors*, 1 Cal.4th 81, 2 Cal.Rptr.2d 513, 820 P.2d 1023 (1991) *rev'g* 272 Cal.Rptr. 574 (Cal.Ct.App.1990). However, California courts have not decided whether local ordinances governing the remediation of hazardous waste sites duplicate and/or contradict the HSAA. Such a definitive ruling on this sensitive issue by a state court could obviate the need for this court to rule on the constitutional claims. However, the California courts have not spoken definitely in this matter.

Accordingly, this court abstains from ruling on whether the Ordinance is preempted by the HSAA.

9. The City's December 23, 1998 Letter

At the December 4 hearing, the court asked plaintiff's counsel if the City could be a potentially responsible party (PRP) under CERCLA. Plaintiff's counsel answered affirmatively, but unable to cite a case in support of his answer, he agreed to promptly file a letter containing the appropriate citations. The court received counsel's two-page letter on December 14, 1998. The letter lists citations for five cases followed by brief descriptions of the propositions for which they are cited.

On December 23, 1998, the City filed a four-page response and attached a copy of a note from the Stanford Environmental Law Journal. The court neither solicited nor approved the filing of the City's response. Local Rule 78-230 makes no provision for the filing of such documents. It is improper. Fireman's Fund moves the court to strike the City's letter filed December 23, 1998. The motion to strike is granted.[7]

CONCLUSION

1. Plaintiff's motion for partial summary judgment and for permanent injunction is DENIED.

2. The individual defendants and the Firm are DISMISSED.

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[7] Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. L.R. 78-230(h).

3. The first cause of action is DISMISSED as to Defendant City of Lodi.

4. The court abstains from consideration of plaintiff's second through sixth causes of action, and they are DISMISSED WITHOUT PREJUDICE.

5. Defendant City of Lodi's letter filed December 23, 1998, is STRICKEN.

The Clerk of the Court is directed to close this file.

IT IS SO ORDERED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

[Filed March 5, 1999]

No. CIV. S-98-1712 FCD/JFM

Unigard Insurance Company, et al.,	)
	)
Plaintiffs.	)
	)
v.	)
	)
City of Lodi, California, et al.	)
	)
Defendant.	)
	)

MEMORANDUM AND ORDER

DAMRELL, J.

This action arises from the adoption of the "Comprehensive Municipal Environmental Response and Liability Ordinance" (the "Ordinance") by the City of Lodi, California (the "City"). Plaintiffs Unigard Insurance Company and Unigard Security Insurance Company (collectively "Unigard"), Washington corporations, in their remaining

claims,[1] allege that the Ordinance is preempted by federal and state law and violates the United States Constitution. Specifically, Unigard alleges that the Ordinance is preempted by the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, and state law and regulations, and that the Ordinance violates Unigard's rights secured by the Contract Clause of the United States Constitution.

This matter comes before the court on the City's motion to dismiss. The parties were heard at extended oral argument on December 4, 1998. Having reviewed the numerous filings and exhaustive arguments presented in this case and the related case, *Fireman's Fund Insurance Company v. City of Lodi*, Civ. No. S-98-1489, the court finds that CERCLA does not preempt the Ordinance and that the court should abstain from consideration of whether the ordinance is preempted by state law. Accordingly, the City's motion to dismiss the second cause of action is granted, and the fifth and seventh causes of action are dismissed without prejudice.

PRELIMINARY RULINGS

The court takes judicial notice of documents filed by plaintiffs in support of their opposition to defendant's motion to dismiss. (*See* Pls.' Req. Judicial Not. Opp'n Def.'s Mot. to Dismiss filed 11/2/1998.)

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[1] All claims except the second, fifth, and seventh causes of action were dismissed in proceedings before the United States District Court for the Northern District of California. *See* Order filed 7/6/98.

The court also takes judicial notice of all pleadings presented in support of and opposition to motions filed in *Fireman's Fund Insurance Company v. City of Lodi*, including the amici briefs filed by the American Insurance Association and Insurance Environmental Litigation Association. As the claims of Unigard and Fireman's Fund are similar, and as Unigard expressly incorporated Fireman's Fund's legal argument, the analysis set forth below closely parallels the analysis articulated in this court's Order in *Fireman's Fund Insurance Company v. City of Lodi*.

STANDARD

A complaint will not be dismissed under Federal Rule of Civil Procedure 12(b)(6), "unless it appears beyond doubt that [a] plaintiff can prove no set of facts in support of [its] claim that would entitle [it] to relief." *Yamaguchi v. Department of the Air Force*, 109 F.3d 1475, 1480 (9th Cir.1997) (quoting *Lewis v. Telephone Employees Credit Union*, 87 F.3d 1537, 1545 (9th Cir.1996)). "All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir.1996).

BACKGROUND

1. Factual Background[2]

M & P Investments owns real property in Lodi.

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[2] The Factual Background is drawn from plaintiffs' Complaint, ¶¶ 18-29.

Unigard issued a general liability insurance policy to M & P Investments, effective from May 1985 to May 1986, containing a "sudden and accidental" exception to the pollution exclusion. The policy Unigard issued for the period May 1986 to May 1997, however, contained an "absolute pollution exclusion."

On or about October 1, 1997, the City, pursuant to the Ordinance, served very broad Information Gathering Demands on Unigard. Unigard estimates the cost of compliance would be in excess of $350,000. By the terms of the Ordinance, failure to respond to the demands could result in civil penalties and sanctions and/or criminal penalties.

On or about October 17, 1997, Unigard objected to the demands on federal and state constitutional and statutory grounds.

2. Procedural Background

On May 21, 1998, Unigard filed its complaint in the United States District Court for the Northern District of California alleging that (1) the Ordinance was unconstitutionally vague in violation of the Fifth and Fourteenth Amendments to the United States Constitution; (2) the Ordinance violated the Supremacy Clause of the United States Constitution; (3) the Ordinance violated the Fourth and Fourteenth Amendment guarantees against unreasonable searches and seizures; (4) the Ordinance violated the Contracts Clause of the United States Constitution; (5) the Ordinance was preempted by state law; and (6) the Ordinance violated Unigard's due process and privacy rights secured by the California State Constitution. On July 6, 1998, the United

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States District Court for the Northern District of California abstained from deciding and dismissed Unigard's claims relating to the Information Gathering Demands[3] and, on July 30, 1998, transferred the remainder of the case to this court.

This case was related to *Fireman's Fund Insurance Company v. City of Lodi,* Civ. No. S-98-1489, on September 30, 1998.

On October 16, 1998, the City moved to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(6). After extensive briefing by the parties in support of and opposition to the City's motion and the motions filed in *Fireman's Fund,* the court heard extended argument on December 4, 1998.

ANALYSIS

1. Ripeness

Defendant's argue that Unigard's claims are not yet ripe for adjudication and are properly dismissed. In determining whether plaintiffs' claims are ripe, the court considers (1) whether the issues are fit for judicial decision, and (2) whether the parties will suffer hardship if the court declines to consider the issues. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 201, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983).

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[3] Unigard filed a Notice of Appeal on August 5, 1998.

In the instant case, the court finds the issues fit for judicial decision. The issues do not require further factual development: the content of the Ordinance is clear as are the City's intentions to enforce the Ordinance against Unigard.

2. Standing

Unigard bears the burden of establishing its standing to sue. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Defendant argues that Unigard cannot meet that burden because there has been no "injury-in-fact" to plaintiffs' legally protected interest. *See Sierra Club v. Morton,* 405 U.S. 727, 740, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) (emphasizing that complaint must establish that plaintiff has "direct stake in the outcome" of lawsuit such that decision will resolve concrete dispute to show injury-in-fact).

In the instant case, it is clear that Unigard labors under more than a general threat of enforcement. Unigard has "suffered an 'injury-in-fact' to a legally protected interest that is both 'concrete and particularized' and 'actual and imminent' as opposed to 'conjectural' or 'hypothetical.' " *San Diego County Gun Rights Comm. V. Reno,* 98 F.3d 1121, 1126 (9th Cir.1996).

3. Federal Preemption

The Supremacy Clause of the Constitution, Art. VI, cl. 2, invalidates state laws that "interfere with, or are contrary to the laws of [C]ongress, made in pursuance of the [C]onstitution." *Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. 597, 604, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991)

(quoting *Gibbons v. Ogden,* 22 U.S. (9 Wheat) 1, 211, 6 L.Ed. 23 (1824)). Federal law preempts state law explicitly if the language of the federal statute reveals an express congressional intent to do so. *Barnett Bank of Marion County v. Nelson,* 517 U.S. 25, 31, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996). In the absence of such explicit statutory language, there are two ways of finding preemption by implication: "field preemption" and "conflict preemption." Field preemption occurs "where the federal scheme of regulation is so pervasive that Congress must have intended to leave no room for the States to supplement it." *United States v. City and County of Denver,* 100 F.3d 1509, 1512 (1996) (citing *Barnett Bank,* 517 U.S. at 31).

> Congress' intent to supersede state law in a given area may nonetheless be implicit if a scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," if "the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or if the goals "sought to be obtained" and the "obligations imposed" reveal a purpose to preclude state authority.

Mortier, 501 U.S. at 605 (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). Conflict preemption occurs when Congress has not chosen to occupy a particular field, but federal and state law conflict. "Such a conflict arises when compliance with both federal and state regulations is a physical impossibility or

when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Mortier,* 501 U.S. at 605 (citations and quotation marks omitted).

Federal preemption of state law is not favored, especially in areas of law traditionally dominated by the individual states. When considering the preemptive effect of a federal statute, the court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless it was the clear and manifest purpose of Congress." *Rice,* 331 U.S. at 230; *see English v. General Elec. Co.,* 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). For the purposes of this preemption analysis, the court analyzes the constitutionality of a local ordinance and a statewide law in the same way. *Mortier,* 501 U.S. at 605.

A. Explicit Preemption

In enacting CERCLA, Congress did not explicitly preempt all state environmental laws. *See, e.g., Bedford Affiliates v. Sills,* 156 F.3d 416, 426 (2d Cir.1998); *Witco Corp. v. Beekhus,* 38 F.3d 682, 687 (3d Cir.1994); *United States v. Akzo Coatings of Am ., Inc.,* 979 F.2d 1409, 1455 (6th Cir.1991); *see also City and County of Denver,* 100 F.3d at 1512 (implicitly finding that language of CERCLA reveals no express congressional intent to preempt state law).

B. Field Preemption

CERCLA is not so comprehensive a scheme of regulation that it provides no room for supplementation by the

states. *See, e.g., Bedford Affiliates,* 156 F.3d at 426-27; *Witco Corp.,* 38 F.3d at 687; *Akzo Coatings,* 979 F.2d at 1455; *see also City and County of Denver,* 100 F.3d at 1512 (implicitly finding that CERCLA does not preempt the field). CERCLA states: "Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to release of hazardous substances within the State." 42 U.S.C. § 9614(a). Congress clearly intended that CERCLA would not occupy the field and anticipated state statutes and regulations imposing additional liability and requirements tailored to the needs of smaller jurisdictions.

The crucial question in this field preemption analysis is whether the term "States" can be read broadly enough to encompass municipalities. Based on this court's reading of *Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. 597, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991), CERCLA's failure to specifically identify municipalities in § 9614(a) is not significant. As the Supreme Court stated in *Mortier* in construing the regulatory authority granted to "States" by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), "[t]he exclusion of political subdivisions cannot be inferred from the express authorization to the 'State[s]' because political subdivisions are components of the very entity the statute empowers." *Mortier,* 501 U.S. at 608. "Mere silence, in this context, cannot suffice to establish a 'clear and manifest purpose' to pre-empt local authority." *Id.* at 607. Because "[t]he term 'state' is not self- limiting since political subdivisions are merely subordinate components of the whole," in order to find field preemption, the court would have to find that states could not redelegate the authority granted to them under CERCLA to their political subdivisions

"either specifically or by leaving undisturbed their existing statutes that would otherwise provide local government with ample authority to regulate." *Id.* at 612. Moreover, the Supreme Court found:

> Even if FIFRA's express grant of regulatory authority to the States could not be read as applying to municipalities, it would not follow that municipalities were left with no regulatory authority. Rather, it would mean that localities could not claim the regulatory authority explicitly conferred upon the States that might otherwise have been pre-empted through actual conflicts with federal law.

Id. Having found that the word "states" does not exclude municipalities, the court does not find that CERCLA precludes states from explicitly or implicitly redelegating their authority to their political subdivisions. Moreover, field preemption cannot be inferred from CERCLA. Section 9614(a) quoted above clearly anticipates that states (and municipalities) will adopt environmental regulations. This language allowing states (and municipalities) to adopt more stringent environmental regulations would be surplusage if Congress had intended to occupy the entire field of hazardous waste cleanup. The court finds the Supreme Court's reasoning in *Mortier* equally applicable to CERCLA.[4]

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[4] In *City and County of Denver,* 100 F.3d at 1513, the Tenth Circuit declined to apply *Mortier* when to do so would impede CERCLA's objective of promoting prompt and efficient remediation of hazardous waste sites. As discussed below, application of *Mortier* in the instant case would not

Contrary authority cited in pleadings presented in *Fireman's Fund Insurance Company v. City of Lodi* is not persuasive. *Town of New Windsor v. Tesa Tuck, Inc.*, 919 F.Supp. 662 (S.D.N.Y.1996), holds that a municipality is not a "government plaintiff" for purposes of cost recovery actions brought pursuant to CERCLA. *Id.* at 681-82 (holding that municipality is not "state" for purposes of § 107(a)(4)(A) of CERCLA, 42 U.S.C. § 9607(a)(4)(A)). However, that limited definition of "state" is not applicable in all instances. In *Town of New Windsor,* the district court acknowledged that "policy considerations, such as facilitating settlement," might justify treating a municipality as a "state" under CERCLA. *Id.* at 682 & n. 22. In the instant case, prompt and efficient remediation of a hazardous waste site is the policy consideration justifying the expansive definition of "state."

In *Borough of Sayreville v. Union Carbide Corp.*, 923 F.Supp. 671 (D.N.J.1996), the district court held that a municipality is not an authorized representative of a state for purposes of bringing an action for natural resource damages recovery under CERCLA unless the municipality has been specifically appointed by the governor of the state. *Id.* at 680-81. Section 104(a)(4)(C) permits only "[t]he President, or the authorized representative of any State" to bring suit on behalf of the public for damages to natural resources. 42 U.S.C. § 9607(f)(1). It is axiomatic that the "authorized representative of any State" must be appointed by the governor of that state, and that a municipality, by its own

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impede CERCLA's overall objective. The Tenth Circuit's reasoning for refusing to apply *Mortier* to CERCLA is inapplicable in this case.

initiative, cannot become the authorized representative of its state. *Borough of Sayreville* does not support the notion that a municipality cannot be treated as a state for purposes of CERCLA's other provisions.

Similarly, *Washington State Dep't of Transp. v. Washington Natural Gas Co.*, 59 F.3d 793 (9th Cir.1995), does not support the contention that a municipality cannot be a state under CERCLA. In fact, *Washington State* holds only that state administrative departments and agencies are within CERCLA's definition of state. *Id.* at 800. The Ninth Circuit did not hold that municipalities fall outside the definition of a state. On the question of whether a municipality is a state for purposes of CERCLA, the court stated:

> Some courts have concluded that the definition of "State" does not include political subdivisions such as municipalities. These cases are not relevant to the issue before us today. A municipality, a local government with authority over a limited area, is a different type of government unit than a state-wide agency that is part of the organized government of the state itself. Our discussion is limited to whether the definition of "State" encompasses the latter.

Id. at 800 n. 5 (citation omitted).

CERCLA does not preempt the field. Congress clearly intended states to enact hazardous waste regulations, and that grant of authority to states encompasses municipalities.

C. Conflict Preemption

Unigard asserts that the Ordinance conflicts with CERCLA in at least five respects: (1) the system for imposition of liability; (2) the statute of limitations; (3) the recovery of attorneys' fees; (4) the imposition of joint and several liability; and (5) the allowance of cumulative remedies. (*See* Compl. ¶ 40.) As described above, conflict preemption occurs when "it is impossible to comply with both federal and state laws, or the state law stands as an obstacle to the accomplishment of Congress's objectives." *City and County of Denver,* 100 F.3d at 1512. Neither circumstance is present in this case.

A quintessential example of conflict preemption due to physical impossibility is found in *United States v. City and County of Denver.* Denver had a local zoning ordinance that directly conflicted with a remedial order issued by the Environmental Protection Agency; the remedial order required on-site solidification of contaminated soils, but Denver's zoning ordinances prohibited the owner from maintaining hazardous waste in areas zoned for industrial use. The owner could not obey both the EPA's remedial order and the cease and desist order issued by Denver. This is conflict preemption, and the district court and the Tenth Circuit so found. *Id.* at 1512-13.

The circumstances in this case are not analogous. The Ordinance is not in actual conflict with CERCLA as to any of the five areas identified by Unigard. Placed side by side, the Ordinance and CERCLA differ but it is not physically impossible for Unigard to comply with the provisions of CERCLA and the provisions of the Ordinance. Moreover, no

agency, federal or state, is enforcing CERCLA's provisions in this hazardous waste cleanup effort, nor has Unigard identified any provision of CERCLA with which it must comply pursuant to any order or request of any federal or state agency. Therefore, Unigard need not choose between compliance with CERCLA and compliance with the Ordinance.

Nor does the Ordinance stand as an obstacle to the prompt and efficient remediation of hazardous waste sites. To the contrary, the Ordinance seeks to efficiently collect funds with which the City can institute hazardous waste cleanup. The Ordinance differs from CERCLA in several respects but it is consistent with the overall objectives of CERCLA. Moreover, CERCLA anticipates the promulgation of non-federal hazardous waste statutes and regulations. Municipal regulations cannot be said to thwart Congress's intent to create uniform national hazardous waste legislation where no such congressional intent is apparent. The court does not find that the Ordinance is an obstacle to accomplishment of Congress's goal in enacting CERCLA.

4. State Preemption

Plaintiffs asks this court to determine whether "the city ordinance is preempted by state law[,] ... a sensitive and complex issue involving the distribution of power between the state and local governments." *Cedar Shake and Shingle Bureau v. City of L.A .*, 997 F.2d 620, 622 (9th Cir.1993). Preliminary to any decision on the merits, this court must consider the wisdom of exercising jurisdiction over the state preemption issue. Three factors must be present before abstention is allowed under *Railroad Commission of Texas v.*

Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941):

> (1) the complaint must involve a "sensitive area of social policy" that is best left to the states to address; (2) "a definitive ruling on the state issues by a state court could obviate the need for constitutional adjudication by the state court"; and (3) "the proper resolution of the potentially determinative state law issue is uncertain."

Cedar Shake and Shingle, 997 F.2d at 622 (citing *Kollsman v. City of L.A.*, 737 F.2d 830, 833 (9th Cir.1984)). All three factors are present in the instant case.

First, the preemption question requires the interpretation of a local ordinance which enables the City to pay for hazardous waste remediation it otherwise could not afford. This is an area of serious local concern about which state agencies have expressed no opinion and into which federal intrusion is undesirable.

Second, the resolution of the preemption question would avert the need for this court to make a constitutional ruling. If a state court determines that the local ordinance is preempted by state law, the ordinance would be void, and a federal court would not have to decide Unigard's Contract Clause claim.

Third, the resolution of the preemption question is unclear. Article XI, section 7 of the California State

Constitution provides that municipalities may make and enforce ordinances "not in conflict with general laws." An ordinance in conflict with general laws is void.

> Conflicts exist if the ordinance duplicates, contracts, or enters an area fully occupied by general law, either expressly or by legislative implication. If the subject matter or field of the legislation has been fully occupied by the state, there is no room for supplementary or complementary local legislation, even if the subject [was] otherwise one properly characterized as "a municipal affair."

Cedar Shake and Shingle, 997 F.2d at 623 (quoting *Cohen v. Board of Supervisors,* 40 Cal.3d 277, 219 Cal.Rptr. 467, 474, 707 P.2d 840 (Cal.1985) (citations omitted)). California courts have not decided whether local ordinances governing the remediation of hazardous waste sites duplicate and/or contradict the state law.

Accordingly, this court abstains from ruling on whether the Ordinance is preempted by state law.

CONCLUSION

1. Defendant's motion to dismiss the second cause of action is GRANTED.

2. The court abstains from consideration of plaintiffs' fifth and seventh causes of action, and they are DISMISSED WITHOUT PREJUDICE.

The Clerk of the Court is directed to close this file.

IT IS SO ORDERED.

APPENDIX E-1

LODI MUNICIPAL CODE

Title 8
HEALTH AND SAFETY

Chapter 8.24
COMPREHENSIVE MUNICIPAL ENVIRONMENTAL RESPONSE AND LIABILITY

8.24.010 Definitions.
Unless otherwise expressly stated, whenever used in this chapter, the following terms shall have the meanings set forth below:

1. The term "abatement action" means any of the following activities that the enforcing officer determines are or may be necessary to respond to an existing or threatened environmental nuisance:

    a. The investigation, study, analysis, or assessment of the nature and extent of any known or suspected environmental nuisance, including, but not limited to, any known or potential endangerments to the public health, welfare, or the environment resulting from or contributed to by such environmental nuisance within or affecting the city, as well as any and all resulting damages to any natural resources owned by, controlled by, or appertaining to

the city;

b. The investigation, analysis, or assessment of the causes and effects of any environmental nuisance within the city or that is or may be adversely affecting the public health, welfare or the environment within the city;

c. The analysis and selection of suitable methodology and technology for the conduct of a comprehensive remedial investigation in compliance with the requirements of this chapter, the assessment of the qualifications of, and retention of, appropriate technical, legal, and scientific personnel determined by the enforcing officer to be necessary or appropriate to the conduct of a remedial investigation by the city or under its oversight and monitoring, and the creation, finalization, and implementation of the comprehensive work plan for the appropriate remedial investigation approved by the enforcing officer;

d. The analysis and selection of suitable methodology and technology for the conduct of a comprehensive feasibility study (including any necessary or appropriate endangerment analysis or treatability studies) in compliance with the requirements of this chapter; the assessment of the qualifications of, and retention of, the technical, legal, and scientific personnel necessary or appropriate to the

conduct of a feasibility study (including any necessary or appropriate endangerment analysis or treatability studies) by the city or under its oversight and monitoring; and the creation, development through the review and comment process determined appropriate by the city, finalization, and implementation of the comprehensive work plan for the appropriate feasibility study approved by the enforcing officer;

e. The development and implementation of an environmental nuisance abatement plan that adequately protects, or restores to the maximum extent practicable, the public health, safety, welfare, environment, natural resources, and current and potential beneficial uses of the environment, including the appropriate abatement of all known or potential endangerments to public health, welfare or the environment;

f. The action necessary to provide adequate protection against any actual or suspected, existing or threatened endangerment of any consequence warranting a response to assure adequate protection of the public health, welfare, or the environment, which endangerment was caused or contributed to in whole or in part by an environmental nuisance within the city or affecting the city;

g. Such actions as are necessary and proper for the enforcing officer to implement, and to evaluate the effectiveness of, any of the activities listed in subparagraphs (1)(a) through (1)(f), whether those activities were implemented in whole or in part by the enforcing officer, or by any other person;

h. The development and implementation of public information and public relations programs consistent with the requirements of this chapter and determined necessary or appropriate and approved by the enforcing officer to keep the public informed about, and to allow public input and participation in, significant activities designed to respond to any environmental nuisances having any significant bearing on the public health or the environment within the city;

i. Such actions as are necessary and proper for the enforcing officer to provide comprehensive and effective oversight and monitoring of the performance of any of the activities described in subparagraphs (1)(a) through (1)(h) of this section by a responsible party approved by the enforcing officer as capable of implementing an approved response to any environmental nuisance within the city; and

j. Such actions as are necessary and proper for the enforcing officer or the city attorney to effectively coordinate and cooperate with the

lawful actions of appropriate agencies of federal, state and county government in responding to any environmental nuisance, and to pay, as determined appropriate by the city council, some or all of the costs of oversight and involvement by any such governmental agencies with respect to any environmental nuisance in which the city is a responding agency or in which it is acting as lead agency.

2. The term "abatement action costs" means any and all legal, technical or administrative fees and costs and interest and other costs of financing incurred by the city in performing or preparing to perform an abatement action in compliance with the requirements of this chapter. The term "abatement action costs" shall specifically include, but shall not be limited to, any and all costs incurred by the city:

a. For expert assistance in health, law, engineering and environmental science, expert witness services and legal fees (including, but not limited to, internal costs of the city attorney's office or outside legal counsel deemed necessary at the sole discretion of the city) to study, investigate, abate, remove, remediate or respond to an actual or threatened environmental nuisance or any endangerment to the public health, welfare or the environment that may be presented by an actual or threatened environmental nuisance;

b. To investigate or respond to the existence, or threat of an environmental nuisance;

c. To monitor, assess or evaluate an environmental nuisance or any endangerment to the public health, welfare or the environment that may be presented by an actual or threatened environmental nuisance:

d. To prevent, minimize, or mitigate an environmental nuisance or any endangerment to the public health, welfare or the environment that may be presented by an actual or threatened environmental nuisance;

e. To oversee and monitor the performance by any responsible party of any investigation or abatement action in response to a condition which is or may be an environmental nuisance;

f. To review, comment on, or revise a responsible party's plans and proposals submitted pursuant to Section 8.24.050(E) or to oversee and monitor the performance by any responsible party of any of the monitoring and testing activities which may be required pursuant to Section 8.24.050(E);

g. To prepare for or undertake necessary enforcement activity, including the recovery of abatement action costs incurred or to be incurred by the city or any injunctive relief authorized by this chapter to respond to an

environmental nuisance; provided, however, that the term shall not include any costs incurred to compel compliance with an information demand issued pursuant to Section 8.24.050(B) of this chapter prior to the entry of a judicial order upholding that information demand, in whole or in part; or

h. To pay the following:

i. The costs of investigation and evaluation, as authorized by the city council, of such financing, with recourse to the maximum extent available solely against the present and future assets and recoveries pledged to comprehensive municipal environmental response fund or any subfund of the comprehensive municipal environmental response fund created by the city council as authorized by Section 8.24.070(A), as may be necessary and proper to accomplish the purposes set forth in this chapter; and

ii. The costs of issuing, servicing, and retiring of any financing instruments authorized by the city council as provided in Section 8.24.070, with recourse to the maximum extent available solely against the present and future assets and recoveries pledged to

the comprehensive municipal environmental response fund or any subfund of the comprehensive municipal environmental response fund created by the city council as authorized by Section 8.24.070(A).

3. The term "contractual relationship":

a. For the purpose of Section 8.24.040 (B)(3) of this chapter, a "contractual relationship" means and includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance, pollutant or waste on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by clear and convincing evidence:

i. At the time the defendant acquired the facility, the defendant did not know and had no reason to know that any hazardous substance, pollutant or waste which is the subject of the release or threatened release was disposed of on, in, or at the facility.

ii. The defendant is a government entity which acquired the facility by escheat,

or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

iii. The defendant acquired the facility by inheritance or bequest.

In addition to establishing the foregoing, the defendant must establish that he has satisfied the requirements of Section 8.24.040(B)(3)(a) and (b) of this chapter.

b. To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (a) of this paragraph (3), the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence, the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination on, at or around the property, and the ability to detect such contamination by appropriate inspection. To establish that the defendant had no reason

to know, as provided in clause (i) of subparagraph (a) of this paragraph, a defendant who acquired commercial or industrial property must establish: (i) that he identified the existence or actual operation on the commercial or industrial property within the twenty-year period immediately preceding the defendant's acquisition of the commercial or industrial property of every owner or tenant engaged in a business or industry known to routinely use hazardous substances in the operation of such business or industry, or that the identification of any such tenant was legally impossible; and (ii) that he conducted a complete, commercially reasonable environmental investigation of the area that may have been impacted by operation of any such business or industry to ascertain the likely presence in the environment and likely impact on the public health or the environment of any hazardous substances or pollutants which may have been released from the operation of such business or industry.

c. Nothing in this paragraph (3) or in Section 8.24.040(B)(3) of this chapter shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance, pollutant or waste at such facility when the defendant owned the

real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under Section 8.24.040 (A) of this chapter and no defense under Section 8.24.040(B)(3) of this chapter shall be available to such defendant.

d. Nothing in this paragraph shall affect the liability under this chapter of a defendant who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance, pollutant or waste which is the subject of the action relating to the facility.

4. The term "effective settlement" means a good faith settlement of all or any part of any liability or obligation imposed pursuant to this chapter that has been resolved between the enforcing officer, with the advice and written consent of the city attorney, or the city attorney and any responsible or potentially responsible party, and which, considering all appropriate factors and circumstances, effectuates the purposes and goals of this chapter, and which settlement has been either reduced to, and is wholly contained in, a writing, or all the material terms of which have been recited and agreed to before a court of record of competent jurisdiction. Any settlement agreed to by the parties and approved by the city attorney in writing shall be valid and binding between the parties to the settlement unless such settlement is rejected by the city council at its next meeting at

which the settlement may be properly considered and acted upon.

5. The term "enforcing officer" means the city public works director, the water/ wastewater superintendent of the public works department of the city, and such other person(s) duly designated by the city council of the city.

6. The term "environment" means any surface water, groundwater, soil water, drinking water supply, soil, land surface, subsurface strata, or ambient air within, under the jurisdiction of, or affected by conditions emanating from the city.

7. The term "environmental nuisance" means:

   a. Any condition which may affect the environment within the city which is or may be injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, or which introduces, or may cause or allow the introduction of, hazardous substances or pollutants into, any navigable lake, river, bay, stream, canal, or basin (specifically including any ground water within the territorial boundaries of the city), or any public park, square, street, or highway;

b. Any condition that requires an investigation or response of any kind in order to secure adequate protection of public health, welfare, safety, or the environment resulting in whole or in part from a release, or threatened release which causes the incurrence of abatement action costs by the city, of any hazardous substance, pollutant or waste;

c. Any environmental condition arising from the past or present handling, storage, treatment, transportation or disposal of a hazardous substance, pollutant or waste which may present an endangerment that may warrant an investigation or response to secure adequate protection of public health, welfare, safety, or the environment; or

d. Any environmental condition or process declared to be a nuisance by the city council of the city, specifically including, but not limited to, the city Ordinance No. 1647, Chapter 8.22 of this code, as the same may be amended from time to time.

8. The term "facility" means:

a. Any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock or aircraft; or

b. Any site or area where a hazardous substance or pollutant has been deposited, stored, disposed of, or placed, or otherwise has come to be located, but does not include any consumer product in consumer use.

9. The term "financing costs" means the costs of servicing and retiring any financing instruments, including without limitation, the cost of principal, interest and any premium payable on or with respect to any such financing instruments, and any costs, fees, and expenses incurred to issue such instruments, to credit enhance such instruments, or to obtain any commitment to purchase such instruments, and, if provided by the documents securing any financing instruments, to indemnify the holders of such financing instruments or other parties.

10. The term "financing instruments" means any note, bond, or any certificate of participation evidencing an interest in a lease purchase obligation, installment purchase obligation or other purchase obligation of the city issued for the purpose of financing abatement action costs incurred or to be incurred by the city.

11. The term "financing proceeds" means any sums provided to the city resulting from the issuance or incurrence of a financing instrument.

12. The term "hazardous substances" means and includes, but shall not be limited to, the following:

a. Tetrachloroethene (PCE), Tri-chloroethene (TCE), 1,1,1-Trichloroethane (1,1,1-TCA), 1,1-Dichloroethene (1,1 DCE), cis 1,2-Dichloroethene (c-1,2 DCE), 1,2-Dichloroethane (1,2 DCA), 1,1-Dichloroethane (1,1, DCA), Benzene, Toluene, Ethylbenzene, Xylene, Chromic Acid, Hexavalent Chromium, Bromodichlorome-thane, Carbon Tetrachloride, Chloroethane (Ethyl Chloride), Chloromethane (Methyl Chloride), Dibromochloromethane, 1,4-Dichlorobenzene, Dichlorodifluoromethane, Dichloromethane, trans-1,2-Dichloroethene, 1,2,3,-Trichloropropane, and Chloroethene (Vinyl Chloride); and

b. Such other materials as are included within the definitions set forth in:

i. Section 104(14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub.L. 99-499, 100 Stat. 1613, and as further amended by the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub.L. 104-208, 110 Stat. 3009, 42 U.S.C. Sections 9601--9675 (hereinafter collectively "CERCLA"), 42 U.S.C. Section 9601(14);

ii. Section 1004(5) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as further amended by the Hazardous and Solid Waste Amendments of 1984, and as further amended by the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub.L. 104-208, 110 Stat. 3009, 42 U.S.C. Sections 6901-- 6992k (hereinafter collectively "RCRA"), 42 U.S.C. Section 6903(5);

iii. Section 9001(8) of RCRA, 42 U.S.C. Section 6991(8);

iv. Section 307(a) of the Federal Water Pollution Control Act, as amended by the federal Clean Water Act, 33 U.S.C. Section 1317(a), and its implementing regulations;

v. Section 2701(23) of the federal Oil Pollution Act of 1990, 33 U.S.C. Section 2701(23);

vi. Section 112(6) of the federal Clean Air Act, 42 U.S.C. Section 7412(6);

vii. Section 25299.22 of the California Health and Safety Code;

c. Any radioactive material; and

d. Any other substance, as determined by the city council of the city, which poses or may pose a threat to the human health, welfare, natural resources or the environment if improperly handled, treated, transported or disposed of within the city.

13. The term "knowingly" imports only a knowledge that the facts exist which bring the act or omission within the provisions of this chapter. It does not require any knowledge of the unlawfulness of such act or omission, nor does it require any knowledge of any requirement in law that a person affirmatively conduct any inquiry or assessment; however, for purposes of this chapter, a person acts knowingly if he proceeds without knowledge of any fact which the law, including this chapter, imposes an affirmative obligation to know or ascertain.

14. The term "National Contingency Plan" or "NCP" means the National Oil and Hazardous Substances Pollution Contingency Plan promulgated by the U.S. Environmental Protection Agency and codified at 40 C.F.R., Part 300, in accordance with section 105 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub.L. 99-499, as further amended by the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub.L. 104-208 ("CERCLA"), 42 U.S.C. Section 9605, as the same

may be amended or repromulgated from time to time ("NCP"), which plan, as referenced in and for purposes of interpreting this chapter, shall be interpreted, read and understood, unless the context unambiguously requires otherwise, as the city being and acting in every regard as the "Lead Agency."

15. The term "natural resources" means land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other such resources belonging to, managed by, held in trust by, or otherwise controlled or protected by the city, or subject to its jurisdiction.

16. The term "permitted activity" means:

a. Any activity expressly authorized by valid permit issued by a federal, state, county, city or other governmental unit or agency with jurisdiction and authority to issue such permit which allows the very act, omission or process that is defined as, or which created or contributed to, an environmental nuisance as defined by this chapter. A license or permit to introduce waste, wastewater or other material into a city sewer does not constitute a permitted activity with regard to any such material which has come to be located in the environment after its discharge to a sewer, sewer lateral, or connecting pipe, but prior to its actual arrival at a publicly owned treatment plant; or

b. Any activity expressly authorized by federal, state, county, city or other governmental statute, regulation, rule or other legislative enactment which allows the very act or process that is defined as, or which created or contributed to, an environmental nuisance as defined in this chapter. Such authorization to introduce waste, waste-water, or other material into a city sewer does not constitute a permitted activity with regard to any such material which has come to be located in the environment after its discharge to a sewer, sewer lateral, or connecting pipe but prior to its actual arrival at a publicly owned treatment plant.

17. The term "person" means an individual, trust, firm, joint stock company, corporation, including a governmental corporation, dissolved or bankrupt corporation to the extent of its available insurance assets or undistributed non-insurance assets, bankruptcy trustee, debtor in possession under the federal bankruptcy laws, partnership, association, consortium, joint venture or commercial entity. The term "person" also includes any municipality, county, commission, district, any state, any department or agency thereof or any political subdivision thereof, any interstate body, or the United States, and any of its agencies or instrumentalities to the extent authorized by law, as well as the estate of a deceased individual to the extent of available insurance assets as referred to in Division 2, Part 13 of the California Probate Code, Sections 550--555.

18. The term "pollutant" means and includes any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiologic malfunctions (including malfunctions in reproduction) or physical deformations in such organisms or their offspring.

19. The term "privilege" means and includes any legal right recognized by the Constitution or laws of the United States or of the state of California pursuant to which a person possessing the right or having the authority or obligation to assert the right may refuse to disclose any matter or refuse to produce any writing, object, or other thing. For purposes of Section 8.24.050(B) (4)(b), the term "privilege" does not refer to nor include the privilege against self-incrimination.

20. The term "proceeding" means any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, the city council, a hearing officer duly appointed pursuant to Chapter 2.34 of this code, the enforcing officer, or any other person authorized by law) in which, pursuant to law, specifically including this code, testimony can be compelled to be given or documents of any kind can be compelled to be produced.

21. The term "release" means any accidental or intentional placing, spilling, discharging, leaking, pumping, pouring, emitting, emptying, injecting, escaping, leaching, dumping, or disposing into the environment.

22. The term "responsible party" means any person described in Section 8.24.040(A) (1) through (9), inclusive, and, for purposes of the obligations imposed by Section 8.24.050(D) only, the persons described in Section 8.24.050(E).

23. The term "waste" means and includes garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations and from community activities, as well as sewage and any and all other waste substances, liquid, solid, gaseous or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal. (Ord. 1684 § 1 (part), 1999)

8.24.020 Declaration of Public Nuisance.

The city council of the city declares that each and every environmental nuisance as defined in Section 8.24.010(7) is a nuisance and a public nuisance. (Ord. 1684 § 1 (part), 1999)

8.24.030 Abatement Actions.

A. Environmental Response Authorities.

1. Whenever the enforcing officer determines that there is or may be an endangerment to the public health, welfare, the environment or natural resources arising out of or resulting from, in whole or in part, an existing or threatened environmental nuisance, the enforcing officer may utilize funds available in the comprehensive municipal environmental response fund (together with such other or additional funds as may be appropriated for that purpose by the city council) to prepare to undertake, and to undertake, in compliance with the requirements of this chapter, any abatement action which is or may be necessary or appropriate to secure adequate protection of the public health, welfare, the environment or natural resources.

2. In addition to any other action taken by federal, state, or other local government, whenever the enforcing officer determines that there is or may be an endangerment to the public health, welfare, the environment or natural resources arising out of, in whole or in part, an existing or threatened environmental nuisance, the enforcing officer may either:

   a. Issue an administrative order directing any responsible party(ies) to undertake

partial or comprehensive abatement actions consistent with the National Contingency Plan, as modified, if at all, by the enforcing officer pursuant to subsections (A)(5) or (6) of this section, so as to provide adequate protection of the public health, welfare, the environment or natural resources; or

b. Request that the city attorney for the city immediately seek such relief as may be necessary or appropriate from a court of competent jurisdiction, which court, upon finding that there is, or that the conditions complained of may present an endangerment to the public health, welfare, the environment or natural resources arising out of or resulting from, in whole or in part, an existing or threatened environmental nuisance, shall grant such relief to abate the environmental nuisance or endangerment as is consistent with the relevant requirements of this chapter and the public interest and equities of the case to secure adequate protection of the public health, welfare, the environment or natural resources.

At his discretion, the enforcing officer may, with the advice and consent of the city attorney, both issue an administrative order

pursuant to subsection (A)(2)(a) of this section and request that the city attorney for the city seek such relief as may be necessary or appropriate from a court of competent jurisdiction pursuant to subsection (A)(2)(b) of this section.

3. Any such administrative order issued by the enforcing officer pursuant to this section shall include a statement of the factual and legal grounds upon which the order is issued and may include a schedule for completion of specific actions. Such order shall also specifically advise the person(s) to whom it is issued of the right to contest the order and request a hearing as provided for in Section 8.24.060 of this chapter. Such order shall also conspicuously advise the person to whom it is directed that failure to request the hearing within the time and in the manner provided for in Section 8.24.060 of this chapter will result in the order becoming final and binding.

4. Except to the extent that the city has authority pursuant to law to impose additional or more stringent requirements, all abatement actions imposed pursuant to this chapter involving environmental impacts on waters of the state shall be consistent with any applicable waste discharge requirements or other order issued pursuant to Division 7 (commencing with Section 13000) of the California Water Code, all applicable state policies for water quality

control adopted pursuant to Article 3 (commencing with Section 13140) of Chapter 3 of Division 7 of the California Water Code, and all applicable water quality control plans adopted pursuant to Section 13170 of the California Water Code and Article 3 (commencing with Section 13240) of Chapter 4 of Division 7 of the California Water Code, unless the enforcing officer, with the advice and consent of the city attorney, determines that the applicability of those provisions and any orders issued pursuant to them is, in the instance of any environmental nuisance which the city is actively abating or causing to be abated pursuant to the provisions of this chapter, voided, in whole or in part, by operation of California Water Code Sections 13002 (a) or (b) or any applicable provision of federal law.

5. Notwithstanding subsections (A)(2) and (4) of this section, the enforcing officer may order additional or more stringent requirements for abatement action than those that would or might apply under the NCP whenever the enforcing officer determines that there is or may be an endangerment to the public health, welfare, the environment or natural resources arising out of or resulting from, in whole or in part, an existing or threatened environmental nuisance, and the enforcing officer determines that such additional or more stringent requirements are necessary or appropriate to

secure adequate protection against, or appropriate abatement of, such environmental nuisance, or are necessary or appropriate to protect or restore approved land uses consistent with the general plan within the city.

6. The enforcing officer, on his own initiative or upon a timely and appropriately supported application for waiver by a responsible party, may order less stringent requirements for abatement action than those that would or might apply under the NCP, whenever the enforcing officer determines that it is in the best interests of the public health, welfare, the environment or natural resources, after considering the following factors:

a. Adequate protection of the public health, welfare, the environment or natural resources in light of the existing or threatened endangerments presented and the public and private resources that are, or are likely to be, available to meaningfully and appropriately respond to such endangerments;

b. Restoration of, to the fullest extent practicable, the free use and enjoyment of land within the city, consistent with its general plan, including but not limited to commercial, industrial and

residential use and development;

c. Safety of the city's drinking water;

d. Protection of the city's tax base; and

e. Preservation and restoration of the safety and healthfulness of the environment so as to preserve and expand the aesthetic interests and the appropriate development of social, recreational, residential and employment opportunities within the city.

7. Notwithstanding any other provision of this code, at any site within the city which is listed pursuant to Section 25356 of the Hazardous Substance Account Act, any abatement action undertaken pursuant to this Section 8.24.030, the enforcing officer must, at a minimum, comply with, or cause to be complied with, the requirements of Section 25356(c) of the Hazardous Substance Account Act.

B. **Imminent and Substantial Endangerment Response Authorities.** Without conditioning or limiting the environmental response authorities set forth in subsections (A)(1) through (7) of this section, whenever the enforcing officer determines that the past or present handling, storage, treatment, transportation, or disposal of any hazardous substance, pollutant or waste may present an imminent and

substantial endangerment to the public health, welfare, the environment or natural resources within the city, the enforcing officer is authorized to undertake, or, by order, to require any responsible party to undertake, an immediate and long-term, as appropriate, abatement action with respect to any such imminent and substantial endangerment, if such action is necessary in the judgment of the enforcing officer, to secure adequate protection of the public health, welfare, the environment or natural resources within the city.

C. Review of Abatement and Monitoring Orders.

1. **Administrative Review.** Any person who has been named in an order issued by the enforcing officer pursuant to this section, may file an objection to such an order. An objection must be in writing and filed with the city clerk and served on the enforcing officer and the city attorney on or before the twentieth day following service of the enforcing officer's order. Any objection must state both the legal and factual bases in support thereof, and must include at a minimum, the requested modification(s), if any, of the order together with a summary of the issues, facts, and legal authorities to be raised at the hearing. The time requirement for filing any objection shall be deemed jurisdictional and may not be waived. Upon timely receipt of an objection which complies with the requirements of this section, the city clerk shall refer the matter to

the next available hearing officer appointed pursuant to Chapter 2.34 of this code of the filing of a compliant objection and shall, as directed by the hearing officer, maintain and transmit to the hearing officer a complete copy of the file.

2. Judicial Review.

a. Pursuant to Section 1085 of the Code of Civil Procedure, any person who has been named in an order issued by the enforcing officer pursuant to this section, may, following exhaustion of administrative remedies, seek judicial review of the order by filing a petition for writ of mandate within ninety days after the order becomes final and binding pursuant to this chapter. Any other person who has the right to seek judicial review of the order by filing a petition for writ of mandate pursuant to Section 1085 of the Code of Civil Procedure shall do so within one hundred eighty days after the order has become final and binding pursuant to this chapter. The filing of a petition for writ of mandate to review the order shall not stay any action specified in the order.

b. For purposes of judicial review, the court shall uphold the abatement action

order if the order is based upon substantial evidence available to the enforcing officer. (Ord. 1684 § 1 (part), 1999)

8.24.040 Liability.

A. Liability for Abatement Action Costs and Damages. Notwithstanding any other provision of municipal law:

1. Any person who creates, has created, or threatens to create an environmental nuisance;

2. Any person who has contributed to, is contributing to, or threatens to contribute to an environmental nuisance;

3. Any person who maintains, has maintained or threatens to maintain an environmental nuisance;

4. Any person who, at any time during the creation or existence of an environmental nuisance, owned or had control over any facility at or from which an environmental nuisance within the city has been created, contributed to, or maintained and, who, regardless of actual knowledge of the existence or nature of the environmental nuisance condition, failed to abate the environmental nuisance;

5. Any person who owns or operates any facility at or from which there has been a release of a hazardous substance or pollutant;

6. Any person who at the time of disposal of any hazardous substance or pollutant owned or operated any facility at which such hazardous substance or pollutant was disposed of;

7. Any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances or pollutants owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances or pollutant;

8. Any person who owns or operates, or who owned or operated at or after the time of such release, any property at which hazardous substances or pollutants came to be located during such person's period of ownership or operation as a result, in whole or in part, of the previous release of, or the passive migration of previously released, hazardous substances or pollutant, regardless of the source of such original release, and who, having reasonable grounds to know or suspect the existence of the released hazardous substances or pollutants on the facility he owns or operates, failed to abate it; and

9. Any person (including any past or present generator or past or present transporter) who has contributed to or is contributing to the past or present handling, storage, treatment, transportation or disposal of any hazardous substance or pollutant which presents an environmental nuisance or which may present an imminent and substantial endangerment to health or the environment

shall be liable for:

a. All abatement action costs incurred by the city to undertake, or to cause or compel any responsible party to undertake, any abatement action in compliance with the requirements of this chapter, whether those costs are incurred prior to, during or following enactment of the ordinance codified in this chapter;

b. Any other necessary costs of response incurred by the city not inconsistent with the requirements of this chapter; and

c. Damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from the environmental nuisance;

d. Interest on expended amounts, other than financing proceeds, recoverable pursuant to this chapter, which interest shall accrue at the rate of ten percent per year compounded daily from the later of the date payment of a specified amount is demanded in writing, or the date of the expenditure concerned.

B. **Defenses.** There shall be no liability under subsection A of this section for a person otherwise liable who can establish by clear and convincing evidence that all of that person's acts or omissions with regard to the environmental nuisance which cause that person to fall within any of the categories set forth in subsections (A)(1) through (9) of this section were caused solely by:

1. An act of God;

2. An act of war;

3. An act or omission of a third party other than an employee or agent of the defendant, or than by one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant if the defendant establishes by clear and convincing evidence that: (a) he exercised due care with respect to the acts, events or conditions giving rise to the environmental nuisance, taking into consideration the characteristics of such hazardous substance or

pollutant, in light of all relevant facts and circumstance, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

4. Any combination of the foregoing paragraphs.

C. Recovery of Abatement Costs.

1. **Civil Action.** At any time after any abatement action costs have been incurred by the city, the city attorney may commence a civil action in the name of the city to recover all such costs from any responsible party.

   a. Such an action may be joined with an action for any other relief, including mandatary or prohibitory injunctive relief, or damages to which the city, acting on its own behalf or as parens patriae, or the people of the state of California may be entitled.

   b. In any civil action brought to recover such costs and civil penalties in which the city prevails, the city shall be entitled to recover three times its incurred (and to be incurred) abatement action costs (including its litigation costs and financing costs and attorneys and expert witness fees and expenses)

and damages, from any responsible party who intentionally, wilfully or knowingly violated, or failed or refused to comply with any final abatement action order issued pursuant to Section 8.24.030 of this chapter without just and sufficient cause. For purposes of this subparagraph, damages shall include the fees and costs incurred to enforce the provisions of this chapter or any information request or final order issued pursuant to it, as well as the damages resulting from the failure or refusal to comply with any requirement of this chapter or any final order (including any order issued under this chapter which was not stayed) issued pursuant to this chapter.

2. **Declaratory Judgment.** In any action brought by the city pursuant to this section to recover its incurred abatement action costs or any injunctive relief authorized by this chapter, the court shall enter a declaratory judgment with respect to liability for abatement action costs that will be binding on any subsequent motion(s) or action(s) to recover further abatement action costs. Upon finding any person liable for reimbursement of abatement action costs or performance of, or prospective obligation to pay for, an abatement action pursuant to this chapter, the court shall retain

jurisdiction over such matter until six months after an abatement action is completed. Upon motion by the city no more often than every six months, any further abatement action costs properly incurred by the city in responding to the environmental nuisance which was the subject of the action shall, following such hearing as the court may deem proper to establish the nature of those costs as recoverable abatement action costs, be reduced to lump sum judgment against the responsible party or parties found liable in such action.

D. **Standard of Liability.** Unless otherwise expressly indicated, the standard of liability imposed by this chapter is strict liability, without regard to any element of mens rea, fault, negligence or other wrongdoing.

E. **Scope of Liability.** The scope of liability in this chapter is joint and several for any person who has caused, created, contributed to, or maintained a single indivisible harm to public health, welfare or the environment resulting from, or which may result from, in whole or in any part, an environmental nuisance and for which there is no reasonable and reliable basis of apportioning the harm among the responsible parties. Any responsible party seeking to apportion the harm must demonstrate by clear and convincing evidence that the component of the harm which is sought to be apportioned is scientifically and technologically susceptible to apportionment, that there is a reasonable and practicable basis for

apportioning the harm, and that the separate abatement activity proposed for that harm is as practicable, safe, efficient, reliable and cost-effective in providing the degree of protection of the public health, welfare and the environment as the abatement activity or activities, if any, proposed by the enforcing officer.

F. **Liability for Attorneys Fees.** In a civil action or proceeding brought or continued in whole or in part pursuant to this chapter by the city attorney to recover abatement action costs, to compel compliance with an abatement action order issued pursuant to this chapter, to enforce an information demand, access, inspection or monitoring order following a judicial order upholding the demand or order in whole or in part, or to abate an actual or threatened endangerment to the public health, welfare or the environment arising out of, in whole or in part, an actual or threatened environmental nuisance, reasonable litigation expenses, including attorneys and expert witness fees and costs may be recovered by the prevailing party. However, the recovery of such fees and costs, including attorneys fees by the prevailing party is strictly limited to those individual actions or proceedings in which the city elects, at the initiation of that individual action or proceeding, to seek recovery of its own attorneys fees.

G. **Obligations or Liability Pursuant to Permitted Activity.** Any obligation to perform an abatement action in response to, or any recovery for abatement action costs or damages incurred (or to be incurred) as a result of, an environmental nuisance resulting from

a permitted activity shall be pursuant to existing law in lieu of this chapter. Nothing in this subsection shall affect or modify in any way the obligations or liability of any person under any other provision of law, including common law, for damages, injury or loss resulting from an environmental nuisance. (Ord. 1684 § 1 (part), 1999)

8.24.050 Information Gathering, Access, Inspections and Monitoring.

A. **Action Authorized.** The enforcing officer, the city attorney or any other person duly designated by the city council of the city may exercise the authority set forth in this section if there is a reasonable basis to believe that there is or may be a threat of an environmental nuisance within the city. The authority of this section may be exercised only for the purposes of investigating the nature or source of, or contributing sources to, an environmental nuisance, or for the purposes of determining the need for abatement actions, choosing or taking an abatement action under this chapter, or for the purposes of determining the nature and extent of the assets and financial resources that are or may be available to (or available to provide indemnity or similar benefits to) any potentially responsible parties to undertake abatement actions which are or may be required pursuant to this chapter or to reimburse the comprehensive municipal environmental response fund for any abatement action costs incurred or to be incurred by the city pursuant to this chapter.

B. Information Gathering.

1. Authority to Compel Production of Documents and Information.

a. The enforcing officer or any other persons authorized to act pursuant to this section may require, upon twenty-eight-day notice or such shorter notice as may be necessary and appropriate under the circumstances, any person who has or may have information relevant to any environmental nuisance within the city or that is or may be adversely affecting the public health, welfare or the environment within the city, regardless of where such information or documents are or may be found, to produce to the enforcing officer or his designee on the date, time and place set forth in his information demand:

i. Complete, written responses to enforcing officer's written demand for information; and

ii. Copies of any nonprivileged books, records and other documents that contain, relate to, or may reasonably lead to the discovery of, any of the following information:

(A) The nature, characteristics, origin or extent of any environmental nuisance, or of any hazardous substance or pollutant which is or may be contributing to such an environmental nuisance;

(B) The nature, characteristics, origin or extent of any existing or threatened release of hazardous substances, pollutants or wastes;

(C) The identification, nature or quantity of materials which may be or may have been related by source, composition, origin, destination or use to the environmental nuisance or an existing or threatened release of hazardous substances, pollutants or wastes;

(D) The identification, location, or nature and extent of any assets

(including any guarantee, indemnity or insurance agreements, contracts or policies of any kind), or information pertaining to the financial condition of any person who is, may have been, or may be a responsible party as defined by this chapter;

(E) Information relating to the ability of any person who is, may have been, or may be a responsible party to pay for or perform an abatement action or to reimburse the city for abatement action costs it has incurred or may incur, including information regarding the assets, ability, liability and responsibility of any guarantor, indemnitor, or insurer of (or providing any benefits to) any person who is or may be a responsible party, to perform or pay

for the performance of any abatement actions, or to pay, indemnify, or reimburse for the costs of any potentially responsible party's performance of an abatement action or payment of abatement action costs incurred or to be incurred by the city.

b. Any person required by the enforcing officer to produce information or to produce and to permit the inspection and copying of any books, records and other nonprivileged documents pursuant to subsection (B)(1) of this section shall, on or before the date and time set forth in the information demand for production, deliver a written certification, signed under oath administered before a notary public or other official authorized by law to administer such an oath:

i. That the written information provided, if any, is truthful and complete;

ii. That the books, records and other documents produced, if

any, together with those withheld from production as privileged or for any other reason and for which the information required by subsection (B)(4) of this section has been timely produced, if any, constitutes the truthful and complete results of a diligent search, conducted in good faith, for the information demanded; and

iii. That all books, records and documents responsive to the information demand that are in the possession, care, custody, or control of that person, its agents, representatives, employees, directors, partners, consultants, parent corporations or other entities, subsidiary corporations or other entities, and to the extent they are available to that person, all books, records and documents responsive to the information demand that are in the possession, care, custody, or control of that person's predecessors or successors-in-interest, and any and all persons acting on its behalf or

in concert with it, have been produced as required by the information demand.

2. **Authority to Compel Testimony.** The enforcing officer, the city attorney or any other persons authorized to act pursuant to this section, upon ten days notice or upon shorter notice as may be necessary or appropriate under the circumstances, may require: (a) any person who has or may have information relevant to any environmental nuisance within the city or that is or may be adversely affecting the public health, welfare or the environment within city; or (b) any person who has or may have information relevant to the assets, ability, liability and responsibility of any guarantor, indemnitor, or insurer of (or providing any benefits to) any person who is or may be a responsible party, which information may be relevant to the ability of the responsible party to perform or pay for the performance of any abatement actions, or to pay, indemnify, or reimburse for the costs of any potentially responsible party's performance of an abatement action or payment of abatement action costs incurred or to be incurred by the city, to appear before the enforcing officer or a certified court reporter designated by the enforcing officer and to give nonprivileged testimony under oath and on a record taken by a certified court reporter concerning such environmental nuisance, as well as concerning

any documents or information that are properly the subject of a request pursuant to subsection (B)(1) of this section. At any such proceeding the enforcing officer shall be represented by, and the witness may be questioned by, the city attorney or an assistant appointed by him. Testimony may be compelled either before or after documents and information are produced as provided hereinabove.

3. **Availability to Public.** All documents or other information obtained by the enforcing officer pursuant to this section shall be available to the public, except that upon a showing satisfactory to the enforcing officer, such information and documentation shall be maintained in the manner described in subsection (B)(5) of this section.

4. **Supporting Materials for Assertions of Privilege or Other Legal Basis for Failure to Produce.**

   a. In order to allow the enforcing officer to adequately assess the validity of any assertion of any privilege for the purposes of determining whether public resources should be expended to pursue production of any withheld document, any person from whom documents are requested pursuant to subsection (B)(1) of this section who fails or refuses to

produce any such documents based in whole or in part upon a claim of privilege or for any other reason must file with the city clerk and with the office of the city attorney on or before the date set forth in the demand for the production of the documents a concise written statement setting forth all factual bases supporting the claim of privilege or other asserted basis for withholding the requested document and the asserted legal authority upon which the failure or refusal to produce is based. The concise written statement required by subsection (B)(4)(a) of this section must, at a minimum, include the following as to each document to be withheld:

i. The identity of the author thereof, the parties thereto and any other person who helped in its preparation;

ii. The title or other identifying data;

iii. The date of the document or, if no date appears thereon, the approximate date;

iv. A summary of the nature (e.g., letter) and content of the

document sufficient to identify it;

v. The name and location of each person having or last having possession, care, custody or control of the original and of each copy thereof and the names of all persons to whom the document has been disclosed;

vi. If such document was, but is no longer in the possession or control of the person from whom the document is requested, what disposition was made of it, including but not limited to the name and address of the person who disposed of the document as well as the date, time, place and mode or method of disposal; and

vii. The precise, current location of the document and the complete name and address of its current custodian.

b. Any person required by subsection (B)(4)(a) of this section to provide the concise written statement described therein who fails or refuses timely to

file a concise written statement that fully complies with the requirements of that section, thereafter, in any civil, criminal, or administrative action by the city or by the city attorney acting on behalf of the people of the state of California, to enforce any provision of this chapter, to abate any nuisance condition, or to recover any abatement action costs, or other fees or penalties pursuant to this chapter, shall be barred from asserting or relying upon any privilege for which a compliant statement of supporting factual basis and legal authority was not timely filed and shall further be barred from withholding based upon any assertion of privilege any document for which all of the details required by subsections (B)(4)(a)(i) through (vii) of this section were not timely provided. The bar established by subsection (B)(4)(b) of this section shall apply only to the assertion of any privilege or other asserted basis for withholding requested information or documents for which no compliant, concise written statement is timely filed. It shall not apply to any failure or refusal to produce such documents based upon the claimed application of the privilege against self-incrimination.

5. Assertions of Confidentiality Arising From Trade Secret.

a. Upon a showing to the enforcing officer by any person pursuant to subsection (B)(5)(c) of this section that records, reports, documents, or other information to which the enforcing officer or any officer, employee or representative of the city has access under this section, if made public would divulge information entitled to protection under 18 U.S.C. Section 1905, under California Evidence Code Section 1060, under California Civil Code Section 3426.1(d), or under California Health and Safety Code Section 25538, such information and documentation shall be considered confidential in accordance with the purposes of those sections and the properly substantiated trade secret information shall be segregated from information which shall be made available to the public upon request in accordance with the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code). In the event the enforcing officer determines that certain records, reports, documents, or other information are not entitled to

confidential treatment as trade secrets pursuant to this section, the enforcing officer shall file with the city clerk and serve on the persons making the assertion of confidentiality a written order setting forth his determination.

b. No person required to provide information or documents under this section may claim that the information is entitled to protection under this section unless such person clearly demonstrates each of the following:

i. Such person has not disclosed the information to any other person, other than an officer or employee of the United States, the state of California or local government, or an employee of such person who is bound by a confidentiality agreement, and such person has taken reasonable measures to protect the confidentiality of such information and intends to continue such measures;

ii. The information is not required to be disclosed, or otherwise made available, to the public under any other federal, state or local law;

iii. Disclosure of the information is likely to cause substantial harm to the competitive position of such person; and

iv. If specific chemical identity is sought to be protected, that such chemical identity is not readily discoverable through reverse engineering.

c. The following procedure shall apply whenever the owner of a trade secret wishes to assert his or her trade secret privilege:

The owner of the trade secret shall file a petition for a protective order with the city clerk. The petition shall include an affidavit based upon personal knowledge listing the affiant's qualifications to give an opinion concerning the trade secret at issue, identifying, without revealing, the alleged trade secret and articles which disclose the secret, and presenting evidence that the secret qualifies as a trade secret under 18 U.S.C. Section 1905, under California Evidence Code Section 1060, under California Civil Code Section 3426.1(d), or under California Health and Safety Code Section 25538. If such petition is

opposed by the enforcing officer in a written objection filed no later than twenty days following filing of the petition, the city clerk shall notify the next available hearing officer appointed pursuant to Chapter 2.34 of this code who shall schedule and conduct appropriate pre-hearing, including necessary discovery proceedings, if any, and hearing proceedings on the petition.

d. Except as otherwise specified in subsection B of this section, neither the enforcing officer nor any officer, employee or representative of the city shall disclose any properly substantiated trade secret which is so designated.

e. The enforcing officer, as well as any officer, employee or representative of the city, may disclose trade secrets received pursuant to this section to authorized officers, employees or representatives of other governmental agencies only in connection with the official duties of that officer, employee or representative pursuant to any law for the protection of health and safety.

f. If in the course of any administrative or judicial proceeding commenced

pursuant to this chapter, the enforcing officer with the advice and consent of the city attorney determines that trade secrets received pursuant to this section should be disclosed in order to facilitate appropriate protection of public health, welfare or the environment or to secure timely performance of an abatement action, the enforcing officer shall notify each affected business that disclosure under subsection (B)(5)(f) of this section is being proposed and shall describe the nature of the proposed disclosure and the proposed recipients. Unless exigent circumstances render such a delay in disclosure impracticable, each such affected business shall be afforded a period of five business days to object to the proposed disclosure. Trade secrets received pursuant to this section may be disclosed under subsection (B)(5)(f) of this section only if, after consideration of any timely objections submitted by any such affected business, the enforcing officer with the advice and consent of the city attorney determines in writing that, for reasons directly associated with the performance of the abatement action, that the proposed disclosure is necessary to protect the public interest in a safe and healthful environment,

and the enforcing officer with the advice and consent of the city attorney further determines in writing that disclosure of the trade secret information is necessary and appropriate to the timely and competent performance of the selected abatement action. The enforcing officer with the advice and consent of the city attorney may condition disclosure of trade secrets received pursuant to this section upon the making of, or seeking from the court, such protective arrangements and commitments as the enforcing officer or the court finds to be warranted.

g. The enforcing officer, as well as any officer, employee or representative of the city, shall disclose trade secrets received pursuant to this section to the public, or to one or more parties of record to any administrative or judicial proceeding commenced pursuant to this chapter, if compelled to do so by lawful process of any administrative agency or court of competent jurisdiction.

h. Any officer or employee or former officer or employee of the city or any other governmental agency who, because of employment or position, has

possession of, or has access to, information designated as a trade secret pursuant to this subsection, shall not knowingly and wilfully disclose the information in any manner to any person not authorized to receive the information pursuant to this subsection. Any person who violates the provisions of this paragraph, and who knows that disclosure of this information to the general public is prohibited by this subsection, shall, upon conviction, be punished by imprisonment in the county jail for not more than six months or by a fine of not more than five hundred dollars, or by both such fine and imprisonment.

C. Inspections.

1. **Right of Entry.** Whenever necessary for the purpose of investigating or enforcing the provisions of this chapter, or whenever the enforcing officer has reasonable cause to believe that there exists in any structure or upon any land or any premises, any environmental nuisance or a violation of this chapter, specifically including this section, the enforcing officer may enter such structure or land or premises at all reasonable times to inspect the same, or to perform any abatement action or other duty imposed upon or authorized to be undertaken by the enforcing

officer by law, specifically including this code; provided, that if such structure or land or premises be occupied, the enforcing officer shall first present proper credentials and request entry, and further provided, that if such structure, land, or premises be occupied by a firm, corporation or other entity, the enforcing officer shall first make a reasonable attempt to contact a responsible person from such firm or corporation or other entity and request entry, except in emergency circumstances. If such entry is refused, the enforcing officer may issue an administrative access order compelling appropriate access to the site or sites at issue, or he may have recourse to, and may pursue, with the advise and consent of the city attorney, each and every remedy provided by law to secure entry for the purposes described above.

2. **Discretionary Nature of Inspections by Enforcing Officer.** All inspections specified herein shall be at the sole discretion of the enforcing officer and nothing in this section shall be construed as requiring the enforcing officer to conduct any such inspection nor shall any actual inspection made imply a duty to conduct any other inspection. Furthermore, nothing in the section shall be construed to hold the enforcing officer, or any officer, employee or representative of the enforcing officer, responsible for any damage to persons or property by reason of making an inadequate

or negligent inspection or by reason of any failure to make an inspection or reinspection.

3. **Inspection Warrants.** Whenever necessary for the purpose of investigating or enforcing the provisions of this chapter, or whenever the enforcing officer has reasonable cause to believe that there exists in any structure or upon any land or any premises, any environmental nuisance or a violation of this chapter, specifically including this section, the enforcing officer may obtain an inspection warrant from the appropriate court commanding him to conduct any inspection required or authorized by this chapter.

D. Enforcing Officer's Authority to Direct Others. The enforcing officer is expressly authorized, at his sole discretion, to hire, retain or otherwise direct appropriately qualified persons reasonably necessary to assist the enforcing officer in the exercise of the authority granted in this section.

E. Monitoring or Testing.

1. Upon receipt of any information that gives rise to probable cause for the enforcing officer to suspect that an environmental nuisance may be present at a site or facility within the city, the enforcing officer may order the owner or operator of that site or facility or any responsible party having liability for the environmental nuisance that may be present at

such site or facility, to conduct such preliminary monitoring, testing, analysis, and reporting with respect to suspected environmental nuisance as the enforcing officer deems reasonable to ascertain only the existence and nature of any actual or potential environmental nuisance that may exist at the site.

2. An order under subsection (E)(1) of this section shall require the person to whom the order is issued to submit to the enforcing officer within thirty days from the issuance of such order, or such earlier time as may be necessary considering all appropriate circumstances, a proposal for carrying out the required monitoring, testing, analysis, and reporting. The enforcing officer may, after providing such person with an opportunity to confer with the enforcing officer respecting such proposal, require such person to carry out such monitoring, testing, analysis, and reporting in accordance with such proposal, and may impose such modifications to the proposal as the enforcing officer deems reasonable to fully ascertain the nature and extent of the hazard; and

3. If the enforcing officer determines that the owner or operator of the site or facility or other responsible party is not able to, or refuses to conduct monitoring, testing, analysis or reporting satisfactory to the enforcing

officer, or if the enforcing officer deems that any such action carried out by the owner or operator of the site or facility or other responsible party to be unsatisfactory, the enforcing officer may conduct such monitoring, testing or analysis (or any combination thereof) that the enforcing officer deems reasonable to ascertain the existence and nature of an environmental nuisance or the nature and extent of the hazard associated with an environmental nuisance that may be present at or emanating from that site or facility. The enforcing officer may further require, by order, that the owner or operator of the site or facility or other responsible party referred to in subsections (E)(1) and (2) of this section reimburse the city for the costs of such activity undertaken pursuant to subsection (B)(3) of this section.

F. **Mandatory Compliance.** Without privilege to do so, no person shall fail or refuse to comply with any information demand issued pursuant to this section. Nor shall any person fail or refuse to comply with any order issued pursuant to this section or obstruct, impede, or otherwise interfere with compliance with any order issued, or any exercise of any information gathering, inspection, monitoring, testing or access authority provided in this section. Nor shall any person conspire to obstruct, impede or otherwise interfere with the exercise of any information gathering, inspection, monitoring, testing or access authority provided in this section.

G. Notices. All notices required by this section shall be delivered personally or sent by certified mail, postage prepaid, at the address given for purposes of the notice.

H. Other Authority.

1. Nothing in this section shall preclude the enforcing officer or the city from securing access, monitoring or testing or obtaining information and documents in any other lawful manner.

2. In any order issued pursuant to Section 8.24.030(A)(2) or 8.24.030(B) or subsection (E)(1) of this section, the enforcing officer, if he reasonably determines that it would be necessary to secure adequate assurance that the requirements of the order will be fulfilled in a timely, competent, and uninterrupted manner, may require a responsible party to provide at the submission of its required workplan(s) and any amendments or revisions thereto, a performance bond from an "admitted surety insurer" as defined in California Code of Civil Procedure Section 995.120 or other form of surety reasonably acceptable to the enforcing officer and to the city attorney securing the timely, competent and uninterrupted performance of the obligations of the responsible party(ies) under the order. (Ord. 1684 § 1 (part), 1999)

8.24.060 Administrative Procedures.

A. Finality of Demands and Orders Under this Chapter.

1. Finality. Any information demand or order issued by the enforcing officer pursuant to this Chapter 8.24, as such order may be modified in whole or in part following review by a hearing officer or by the city council as authorized by this code, shall become a final, binding demand or order and not subject to any further direct or collateral attack upon issuance and service, except that compliance with such demand or order shall be stayed and all obligations imposed by the demand or order shall be tolled during the following time periods:

a. Upon issuance until expiration of the time established by this Section 8.24.060 for the filing of an objection;

b. Upon the timely filing of an objection, which objection is filed and served in strict compliance with the requirements of this chapter, until such objection has been resolved by the hearing officer's issuance of a recommended final order that upholds the enforcing officer's order in whole or in part, and thereafter until the expiration of the time allowed under this chapter for the

filing of a request of review with the city council;

c. Upon timely filing of a request for review with the city council of the hearing officer's findings, conclusions, and recommended final order, to the extent that it upheld all or any part of the enforcing officer's order, which request is timely filed and served in strict compliance with the requirements of Chapter 2.34 of the municipal code until twenty days after such request has been finally resolved by the city council's issuance of a final order that upholds the hearing officer's recommended order, in whole or in part.

2. **Stays.** The filing of an objection or request for review, when made within the time specified, shall constitute a stay of any requirement to comply with the order for the periods of time specified in subsection (A)(1) of this section, unless such order was issued pursuant to subsection B of Section 8.24.030 to secure adequate protection of the public health, welfare, the environment or natural resources within the city against the past or present handling, storage, treatment, transportation, or disposal of any hazardous substance, pollutant or waste which may present an imminent and substantial

endangerment to the public health, welfare, the environment or natural resources within the city. In such a case, the enforcing officer may require the performance of some or all of the requirements of the order during the pendency of the objection or request for review. Nothing in this section shall preclude or affect the authority of the enforcing officer to implement measures deemed necessary to protect the public health, welfare or the environment from an environmental nuisance or to recover the costs of any such measures, or undertake appropriate action under applicable federal, state or local law.

B. Objections.

1. **Filing of Objections, Including Claim(s) of Privilege, to Demand or Order.** Any person who has been issued an information gathering demand or administrative order by the enforcing officer pursuant to this chapter, may file an objection to the demand or order, either in whole or in part, and must include as or with the objection any claim(s) of privilege or other basis for refusing to comply with the demand or order. An objection must be in writing and filed with the city clerk and served on the enforcing officer and the city attorney on or before the twentieth day following service of the enforcing officer's demand or order. Any objection, including specifically every claim of privilege and every other basis

for refusing to comply with the demand or order, must state with particularity all of the legal and factual bases in support thereof, and must include at a minimum, the requested modification(s), if any, of the demand or order together with a summary of the issues, facts, and legal authorities to be raised at the hearing. The time requirement for filing any objection shall be deemed jurisdictional and may not be waived. Upon timely receipt of an objection which complies with the requirements of this section, the city clerk shall promptly refer the matter to the next available hearing officer selected pursuant to Chapter 2.34 of this code and shall, as directed by the hearing officer, maintain and transmit to the hearing officer a complete copy of the file.

2. **Notice of Failure to Comply With Information Gathering Demand or Administrative Order.** If the enforcing officer determines that any person who has been issued an information gathering demand or an administrative order pursuant to this chapter has failed to respond to or comply with such a demand or order, the enforcing officer may file a notice of failure to comply with the city clerk, naming as respondent the person that has failed to comply with the information demand or order. Such notice must be filed with the city clerk and served on all respondents to the demand or order only after the twenty-eighth day following issuance and

service of the enforcing officer's demand or order. Any notice must state both the legal and factual bases in support thereof, and must include at a minimum, the requested relief, if any, together with a summary of the issues, facts, and legal authorities to be raised at the hearing. Upon timely receipt of a notice which complies with the requirements of this section, the city clerk shall refer the matter to the next available hearing officer selected pursuant to Chapter 2.34 of this code. (Ord. 1684 § 1 (part), 1999)

8.24.070 Establishment and Purpose of Fund.

A. **Creation and Purpose of the Fund.** The city council creates the "comprehensive municipal environmental response fund" into which all amounts, including any thing of any actual or potential value, any causes of actions or things in action, received by the city from, or on behalf of, any responsible party or potentially responsible party shall be deposited. The city council of the city may create such discrete accounts within the comprehensive municipal environmental response fund as may be necessary or appropriate to maintain financial records relating to specific environmental nuisances or to provide specific accounting control and detail. The city council of the city directs the formation, within the comprehensive municipal environmental response fund, of a restricted account to be known as the "Lodi Area of Contamination Comprehensive Environmental Nuisance Abatement

Fund," which shall separately account for all amounts, including any thing of any actual or potential value, any causes of actions or things in action, recovered relating to the soil and groundwater contamination generally referred to as the Lodi area of contamination and directs that all such amounts recovered which relate to the Lodi area of contamination be deposited therein. Amounts in the Lodi area of contamination comprehensive environmental nuisance abatement fund shall be used in the following order: (1) to pay financing costs; (2) to pay expenses, fees and costs incurred pursuant to its enforcement efforts paid for from funds of the city other than financing proceeds; and (3) as authorized by subsection (B) of this section.

B. **Authorized Expenditures.** The funds available, by account, in the comprehensive municipal environmental response fund may be used for the purposes specified in this subsection:

1. To pay all necessary and appropriate cost of abatement of an environmental nuisance incurred by the city or any designated representative of the city;

2. To pay for site characterization of any place that is or may be affected by an environmental nuisance;

3. To pay for all investigative work which is or may be necessary and appropriate relating to an environmental nuisance;

4. To pay for all costs, including but not limited to attorneys' fees and consultant fees, of the immediate commencement and diligent prosecution of appropriate enforcement actions against potentially responsible parties, utilizing, as appropriate, the full range of the city's remedial and regulatory injunctive and cost recovery authority under federal, state and municipal law, to compel the complete, timely, competent and cost-effective performance of all response actions necessary to develop and implement a NCP-compliant remedial action plan ("RAP") that fully characterizes the lateral and vertical extent of the hazardous substances at and emanating from the site and which results in a NCP-compliant RAP which fully and appropriately abates any endangerment to public health, welfare or the environment resulting from the hazardous substances or pollutants at and emanating from the site;

5. To reimburse to the California Environmental Protection Agency, Department of Toxic Substances Control ("DTSC") or any other applicable regulatory agency, the properly billed past response costs incurred by DTSC or any other applicable regulatory agency arising from or related to any environmental nuisance, which costs the city has agreed to pay or reimburse.

C. Issuance of Financing Instruments to Finance Abatement Action Costs.

1. **Authorization to Finance Abatement Action Costs.** If it determines that it may facilitate the effective and expeditious abatement of an existing or threatened environmental nuisance within or affecting the city, the city council, acting alone or upon request of the enforcing officer, may authorize the issuance or incurrence of financing instruments.

2. **Terms and Conditions.** Unless the city council should otherwise determine after considering the nature and extent of the environmental nuisance at issue and the assets that are or may be available to respond to it, the financing authorized by this subsection shall be with recourse solely against the Lodi area of contamination comprehensive environmental nuisance abatement fund to the maximum extent amounts which are required to be deposited therein by this chapter or any documents securing the financing instruments are available. Any documents securing the financing, instruments may provide that the holders of financing instruments shall have a first and superior lien only on all amounts required by this chapter or by any documents securing the financing instruments to be deposited in the Lodi area of contamination comprehensive environmental nuisance abatement fund, which lien will be effective

and perfected as against all third parties upon execution of such financing instruments without any further action by the city and whether or not the city has deposited such amounts in any fund or account as required pursuant to subsection A of this section. (Ord. 1684 § 1 (part), 1999)

8.24.080 Enforcement.

A. Mandatory Compliance. No person shall violate any provision of this chapter or fail or refuse to comply with, or otherwise impair, interfere with, or impede any person's compliance with, any order issued pursuant to this chapter. Nor shall any person conspire to violate any provision of this chapter or refuse to comply with any order issued pursuant to this chapter.

B. Injunctions in Civil Actions.

1. Availability of Injunctive Relief. Upon sufficient proof of an existing or threatened environmental nuisance within the city being presented to the court, such environmental nuisance shall be abated, and any existing or threatened violation of this chapter, specifically including any failure or refusal to comply with any order issued pursuant to Section 8.24.030 herein, or of any final order issued pursuant to this chapter, upon sufficient proof of such violation or threatened violation

being presented to the court, shall be enjoined, and compliance with the appropriate requirements of this chapter shall be directed by a temporary restraining order, preliminary injunction or partial or complete mandatory or prohibitory permanent injunction, or other appropriate order of the court in an action which may be brought in the name of the city by the city attorney.

2. **Required Relief in Certain Cases.** In any action brought by the city attorney, either on his own instance or upon request of the enforcing officer, to enforce compliance with any information demand or order issued pursuant to Section 8.24.050 of this chapter, the court, upon sufficient proof of a violation or threatened violation of such Section 8.24.050 or of any order issued pursuant to it being presented to the court, shall take the following actions:

   a. In the case of interference with entry or inspection, the court shall enjoin such interference or direct compliance with orders to prohibit interference with entry or inspection unless under the circumstances of the case the demand for entry or inspection is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

   b. In the case of information (including

testimony) or document demands or orders, the court shall enjoin interference with such information or document demands or orders, or direct immediate compliance with the demands or orders to provide such information (including testimony) or documents, unless under the circumstances of the case the court finds that the party to whom the request or order was directed has demonstrated that the request or demand for information (including testimony) or documents is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

3. **Equitable Criteria for Injunctions Authorized by this Chapter.** In any civil action brought by the city attorney pursuant to this chapter, in which a temporary restraining order, preliminary injunction, or partial or complete mandatory or prohibitory permanent injunction is sought, it shall not be necessary for the city to allege or prove at any stage of the proceeding that irreparable damage will occur should the temporary restraining order, preliminary injunction, or permanent injunction (including any appropriate nuisance abatement order) not be issued; or that the remedy at law is inadequate, and the temporary restraining order, preliminary

injunction, or permanent injunction (including any appropriate nuisance abatement order) shall issue without such allegations and without such proof.

4. **Appropriate Joinder with Other Remedies.** Any action brought pursuant to this chapter may be brought by the city attorney independent of or combined with any action for civil penalties or any other relief provided by this chapter, other municipal law, or by applicable federal or state law.

C. **Civil Penalties.**

1. **Imposition of Civil Penalties.** Any person who violates any requirement of this chapter or any final order issued pursuant to this chapter, or who fails or refuses to comply with an information demand issued pursuant to this chapter, is liable to the city for the following civil penalty to be credited to and deposited in the comprehensive municipal environmental response fund:

a. Except as provided in subsection (C)(1)(b) of this section, not more than five thousand dollars, but not less than one thousand dollars per violation per each calendar day of violation.

b. Not more than ten thousand dollars, but not less than one thousand dollars

per each intentional, knowing or wilful violation per each calendar day of such violation.

c. Liability under this subsection may be imposed in a civil action or liability may be imposed administratively pursuant to this section. Any such civil action brought by the city attorney may be joined with an action for any other remedy, including injunctive relief, available pursuant to federal or state law or pursuant to this code.

2. **Determination of Amount of Civil Penalties.** In determining the amount of any civil penalty under this section, the court or other adjudicatory body shall, at a minimum, impose a penalty amount which eliminates all economic benefit which has accrued to and which is accruing to the violator by reason of noncompliance and which compensates the public for the harm and damage done to the environment as a result of the violator's noncompliance. Impossibility of substantial compliance, or the impossibility of quantifying the harm to the environment, does not bar the assessment of such a penalty. In addition, in determining the penalty, the court or other adjudicatory body shall consider the violator's degree of recalcitrance, the absence of good faith cooperation with the city and any other governmental entities responding to the

environmental nuisance, the violator's defiance of or indifference to requirements of the law, and any unusual or extraordinary burdens imposed on the public health or welfare or the public fisc as a result of the violation as factors requiring enhancement of the minimum penalty amount; and may mitigate the total amount calculated under the first sentence of this subsection (C)(2) of this section to reflect any part of the noncompliance caused by the existence of extenuating circumstances that were wholly beyond the violator's control or to recognize bona fide efforts by the violator to timely comply with the requirements of the law and to extend significant and meaningful cooperation to the city and to other governmental enforcing agencies with jurisdiction.

3. Information Demand Exception.

a. Notwithstanding any civil penalties imposed in this section, no penalty shall apply to a failure to comply with an information demand issued pursuant to Section 8.24.050 of this chapter, which failure occurred between the issuance and receipt of the information demand and an independent judicial review of such information demand, specifically including the reasonableness or validity of such information demand.

b. Upon upholding the reasonableness or validity of any information demand issued pursuant to Section 8.24.050 of this chapter, the reviewing court, in its discretion, may compel prospective injunctive relief or impose civil or criminal penalties.

D. Criminal Penalties and Fines.

1. Except as provided in (D)(2) of this section, the violation of any provision of this chapter or any final order issued pursuant to this chapter shall be a misdemeanor punishable by a fine of not more than five hundred dollars, or imprisonment for not more than six months, or both for each violation. Each calendar day during which a violation occurs or continues shall constitute a separate violation.

2. The intentional, knowing or wilful violation of any provision of this chapter or any final order issued pursuant to this chapter, shall be a misdemeanor punishable by a fine of not more than one thousand dollars, or imprisonment for not more than one year, or both for each violation. Each calendar day during which such a violation occurs or continues shall constitute a separate violation.

3. The violation of any provision of this chapter or any final order issued pursuant to this chapter by any person who has previously

been convicted of one or more violations of this chapter or any final order issued pursuant to this chapter shall be a misdemeanor punishable by a fine of not more than one thousand dollars, or imprisonment for not more than one year, or both for each violation. Each calendar day during which such a violation occurs or continues shall constitute a separate violation.

4. In any criminal action for violation of any provision of this chapter in which the defendant is convicted of an intentional, wilful, or knowing violation of any provision of this chapter, the court shall tax the defendant for and award the city its reasonable costs of investigation and prosecution incurred in connection with the defendant's violation(s), including its reasonable attorneys fees and costs and expert witness fees and costs.

E. Maximum Penalty. If the maximum amount of any civil or criminal penalty imposed by this section is determined to be in excess of the maximum amount authorized by law, the amount shall be reduced to the maximum amount permitted by law.

F. Relationship to Other Liability and Other Remedies.

1. Nothing in this subsection in any way limits, conditions or affects the liability of any responsible party to the city for abatement

action costs or for any other legal or equitable remedy.

2. In any criminal action brought pursuant to this section in which the defendant is convicted of a violation of this chapter, the court shall, upon motion of the city attorney and following such hearing before the court sitting without a jury as the court may deem necessary, issue appropriate mandatory or prohibitory injunctive relief as may be necessary to restrain further violations of this chapter, to remedy any conditions which may present an endangerments to public health, welfare or the environment arising out of or related to violations of this chapter for which the defendant was convicted, or to secure compliance with the requirements of this chapter.

G. **Remedies not Exclusive.** Remedies under this section are in addition to and do not supersede or limit any and all other remedies, whether civil, criminal or administrative. Nothing in this section shall affect or modify in any way the obligations or liabilities of any person under any other provision of state, federal or local law, including common law, for damages, injury, loss, or for liability for nuisance abatement and nuisance abatement costs incurred by the city which results from an environmental nuisance in the city.

H. **Penalties for Certain Knowing Violations.** In addition to the penalties provided for in subsections A

through G of this section, any person who knowingly fails to provide the notice required by 42 U.S.C. Section 9603(a) or (c), or by California Health and Safety Code Section 25359.4, or any generator subject to California Health and Safety Code Section 25200.3 who knowingly fails to comply with the requirements thereof, as the foregoing requirements relate to hazardous substances, pollutant(s) or waste(s) which present, may present, contribute to, or may contribute to an environmental nuisance as defined in Section 8.24.010(7) within the city, shall not be entitled to any limitation of liability or to any defenses to liability set out in Section 8.24.040(B); provided, however, that notification under this subsection is not required for any facility which would be reportable solely as a result of any stoppage in transit which is temporary, incidental to the transportation movement, or at the ordinary operating convenience of a common or contract carrier, and such stoppage shall be considered as a continuity of movement and not as the storage of a hazardous substance, pollutant or waste.

I. Judicial Review.

1. In any judicial action concerning the adequacy of any abatement action order, or any other order arising pursuant to this chapter, judicial review of any issues concerning the adequacy of any action taken or ordered by the enforcing officer shall be limited to the administrative record. Otherwise, applicable principles of administrative law shall govern whether any supplemental materials may be considered by

the court.

2. If the court finds that the selection of the response action was not in accordance with law, the court shall award only the response costs or damages that are not inconsistent with the requirements of law, including this chapter, and shall grant any other relief that is consistent with the law and this chapter.

3. In reviewing an action brought pursuant to this chapter, in which alleged procedural errors are raised as a defense, the court may impose costs or damages only if the errors were serious and related to matters of central relevance to the action, so that the action would have been significantly changed had the errors not been made. (Ord. 1684 § 1 (part), 1999)

8.24.090 Miscellaneous Provisions.

A. **Severability.** If any provision of this chapter or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application. To this end, the provisions of this chapter are severable. The city council declares that it would have adopted the ordinance codified in this chapter irrespective of the invalidity of any particular portion thereof.

B. Direct Action Against Indemnitors of Certain Potentially Responsible Parties.

1. **Direct Action for Liability under this Chapter in Certain Cases.** In any case where a potentially responsible party is in bankruptcy, reorganization, or arrangement pursuant to the Federal Bankruptcy Code, or if with reasonable diligence, jurisdiction cannot be obtained over a potentially responsible party who is likely, as judged at the time of the commencement of the action, to be solvent to meet all of the relief demanded in the city's complaint or administrative order at the time of judgment or at the time an administrative order becomes final and binding, the city may commence a civil or administrative action to seek relief based upon, or to otherwise recover upon, liability imposed pursuant to this chapter directly against any person that is or may be a surety for, or a guarantor, indemnitor or insurer of ("indemnitor") such a potentially responsible party on any claim arising under this chapter. In any such action, the indemnitor shall be named as the defendant or respondent on its relationship to (i.e., "ex rel." or relator). the potentially responsible party whose liability under this chapter is at issue.

2. **Rights and Defenses Available to Indemnitor.** In the case of any action, either administrative or civil, brought pursuant to this subsection against an indemnitor, such

indemnitor shall be entitled to invoke all rights and defenses which:

a. Would have been available to the relator/potentially responsible party in an action brought against that potentially responsible party by the city pursuant to this chapter; and

b. Which would have been available to the indemnitor if an action had been brought on its contract (including, surety or performance bonds, guarantees, contracts for indemnity, insurance policies, or letters of credit) with the relator/potentially responsible party by a judgment creditor of that relator/potentially responsible party.

3. **Assertion of Indemnitor's Contract Defenses.** The indemnitor shall deny or otherwise contest its liability under the terms and conditions of its contract (including, surety or performance bonds, guarantees, contracts for indemnity, insurance policies, or letters of credit) with the relator/potentially responsible party in the administrative action commenced by the enforcing officer or in the civil action commenced by the city attorney pursuant to this subsection or by an independent action. If the indemnitor denies or otherwise contests its liability under the terms and conditions of its contract with the relator/potentially responsible

party by an independent action, such action, if not already pending at the time of the commencement of an action pursuant to this subsection by the enforcing officer or the city attorney, must be commenced within thirty days of the commencement of the action brought pursuant to subsection, against the indemnitor, must be diligently prosecuted to final judgment and must be through the appellate process, if any, reasonably pursued by the indemnitor. Any claims or defenses to the liability imposed pursuant to this chapter not brought or maintained in compliance with subsection (B)(3) of this section shall be barred.

4. **Avoiding Prejudice to Indemnitors.** In any civil action brought against an indemnitor pursuant to this subsection, all issues that are properly triable to the court sitting without a jury shall be heard and resolved by the court prior to a hearing on the issues, if any, that are triable to a jury as a matter of right and in which a jury has been timely and properly demanded. All other claims shall be heard by a jury. If there are claims, demands or defenses in any such action that are triable to a jury as a matter of right and in which a jury has been timely and properly demanded, notwithstanding that recovery on such claims shall continue to be limited to only those amounts recoverable from the indemnitor pursuant to subsection (B)(5) of this section

and notwithstanding the fact that any judgment rendered on such claims shall be directly enforceable only against the indemnitor, those claims shall precede next in order following resolution of all issues that are triable to the court sitting without a jury and shall, in all regards and proceedings before the jury, be presented as though the case had been brought solely against the potentially responsible party.

5. **Total Liability of Indemnitor.** The total liability of any indemnitor in an action brought pursuant to this subsection shall be limited to the aggregate remaining amount of the monetary limits of the indemnity agreement, policy of insurance, guarantee, surety bond, letter of credit or similar instrument obtained from the indemnitor by or for the benefit of the potentially responsible party, together with:

   a. Any other amounts for which the indemnitor is liable to the potentially responsible party by operation of law resulting, in whole or part, from a breach of the duty to defend against, or the unreasonable failure or refusal to settle, any claim brought against the responsible party by the city; and

   b. Any and all other amounts due and owing under the indemnity agreement, policy of insurance, guarantee, surety

bond, letter of credit or similar instrument by operation of law and the language of the policy of insurance, guarantee, surety bond, letter of credit or similar instrument.

6. **Effect of Judgment.** If the indemnitor elects to deny or otherwise contest its liability under the terms and conditions of its contract (including, surety or performance bonds, guarantees, contracts for indemnity, insurance policies, or letters of credit) with the relator/potentially responsible party in the administrative action commenced by the enforcing officer or in the civil action commenced by the city attorney pursuant to this subsection, the final order or judgment entered in such action brought pursuant to this subsection shall be enforceable directly against the indemnitor(s). If the indemnitor elects to deny or otherwise contest its liability under the terms and conditions of its contract (including, surety or performance bonds, guarantees, contracts for indemnity, insurance policies, or letters of credit) with the relator/potentially responsible party by an independent action, the judgment or final order entered in the action brought pursuant to this subsection and maintained and prosecuted in compliance with the requirements of this subsection shall be enforceable directly against the indemnitor only after final judgment has been rendered in that independent action and then only to the

extent that judgment finds the indemnitor liable under its contract for the liability imposed by this subsection upon the indemnitor by reason of its relationship to the relator/potentially responsible party, and neither the final judgment rendered in the independent action nor execution upon it have been stayed.

7. **No Limitation of Other Liability.** Nothing in this section shall be construed to limit any other state or federal statutory, contractual, or common law liability of an indemnitor, including but not limited to the liability of such indemnitor for bad faith either in negotiating or in failing to negotiate the settlement of any claim.

C. **Relationship to Other Authority.** Nothing in this chapter shall be construed or interpreted to limit, restrict or preempt the authority of the city or of the city attorney for the city pursuant to any other local, state or federal laws, specifically including the authority to assert claims to abate a public nuisance pursuant to California Code of Civil Procedure Section 731.

D. **Settlement Procedures and Consequences.**

1. **Settlement of Joint and Several Liability.** Any person alleged by the city to be jointly and severally liable pursuant to this chapter who has entered into an effective settlement, administrative settlement or judicially

approved settlement shall not be liable for claims for contribution, equitable indemnity, or partial or comparative equitable indemnity regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible parties unless its terms so provide, but it reduces the potential liability of the other jointly and severally liable parties that have not settled by the amount of the settlement. Unless the settlement qualifies as an administrative settlement (the final action validating and approving which, has neither been stayed nor reversed by a court of competent jurisdiction) or as a judicially approved settlement (the final order validating and approving which has neither been stayed nor reversed on appeal by a court of competent jurisdiction) pursuant to this subsection, the status of any settlement of all or any part of any joint and several liability imposed by this chapter as an effective settlement may be challenged in a civil action by any person not party to the settlement agreement whose rights or interests are or may be adversely affected by the settlement and whose claims against the settling party are not otherwise barred.

2. **Administrative Settlement.** The validity of any settlement of all or any part of any joint and several liability or obligation imposed by or pursuant to this chapter (or any other liability that the city attorney is authorized to assert on behalf of the city or the people of the

state of California related to protection of public health, welfare and the environment and which is not required by the general laws of the state of California to be judicially validated or reviewed for good faith purposes by another prescribed process that is exclusive of the processes available pursuant to this chapter) as an effective settlement may be determined by a final action of the city council validating and approving the settlement pursuant to one of the following methods:

a. If there is no administrative proceeding brought pursuant to this chapter to which the settling party is a respondent pending at the time of the effective settlement, at or following a properly noticed public meeting of the city council, provided that advance public notice has been published in the Lodi Sentinel for at least two consecutive two-day periods commencing at least two weeks in advance of the scheduled meeting of the city council at which the settlement will be considered, of the availability of the settlement for public review, the general nature of the pending settlement and its general effects if approval is granted, the date and time scheduled for city council meeting, of the opportunity to submit comments on the settlement to the city attorney for timely presentation to the

city council, and of the opportunity of interested parties to attend the city council meeting and request time to present their views to the city council; or

b. If there is an administrative proceeding brought pursuant to this chapter to which the settling party is a respondent pending at the time of the effective settlement, by joint motion for approval of the settlement brought before the hearing officer by the city attorney and by the settling party, provided that advance public notice of the motion has been published in the Lodi Sentinel for at least two consecutive two-day periods commencing at least two weeks in advance of the scheduled hearing before the hearing officer at which the motion for validation and approval of the settlement will be considered, of the availability of the settlement for public review, the general nature of the pending settlement and its general effects if approval is granted, the date, time and place scheduled for hearing, of the opportunity for interested members of the public to submit comments on the settlement to the city attorney for timely presentation to the hearing officer; and of their right to

petition the hearing officer for permissive leave, conditioned as the hearing deems appropriate, to address the merits of the motion at the scheduled hearing. The hearing officer's report and recommendation regarding the motion for approval and validation of the settlement, which shall be rendered and filed by the hearing officer on an expedited basis, shall, together with any timely objections to that report and recommendation, be brought before the city council for final action at its next public meeting held pursuant to the regularly applicable notice requirements.

3. **Judicially Approved Settlement.** The validity of any settlement of all or any part of any joint and several liability or obligation imposed by or pursuant to this chapter (or any other liability that the city attorney is authorized to assert on behalf of the city or the people of the state of California related to protection of public health, welfare and the environment and which is not required by the general laws of the state of California to be judicially validated or reviewed for good faith purposes by another prescribed process that is exclusive of the processes available pursuant to this chapter) as an effective settlement under this chapter may be judicially determined and finally resolved,

as follows:

a. In an action brought by the city attorney in the name of the city pursuant to Part II, Title 10, Chapter 9 of California Code of Civil Procedure, Sections 860--870; or

b. If, at or within sixty days following the date of settlement, there is a judicial action pending between the settling party and the city in which the city has asserted one or more claims arising under this chapter, by joint motion brought in such pending action for judicial approval of the settlement, with such advance public notice, if any, deemed appropriate by the court of the availability of the settlement for public review, the general nature of the pending motion and its general effects if granted, the date and time scheduled for hearing of the motion, the available intervention procedures, and the opportunity for interested or affected members to submit comments on the settlement to the city attorney for timely presentation to the court, together with the city's response thereto.

4. Persons Not a Party to Settlement.

a. If the city has obtained less than complete relief from a person who has resolved its liability to the city imposed pursuant to this chapter in an administrative or judicially approved settlement, the city may bring an action against any person who has not resolved its liability imposed pursuant to this chapter.

b. A person who has resolved its liability imposed pursuant to this chapter to the city for some or all of an abatement action or other obligation imposed pursuant to this chapter or for some or all of abatement action costs in an administrative or judicially approved settlement may seek contribution pursuant to the general laws of the state of California from any person who has not obtained valid contribution protection for some or all of the liability imposed under this code or pursuant to federal law or the general laws of the state of California.

c. In any contribution action to apportion any liability arising under this chapter, the rights of any person who has resolved its liability to the city shall be subordinate to the rights of the city.

Any contribution action brought under this subsection or concerning any liability arising pursuant to this chapter shall be governed by the general laws of the state of California.

E. Computation of Time. In computing any period of time prescribed or allowed by this chapter, the day of the act, event, or default from which the designated period of time begins to run shall be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than eleven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. (Ord. 1684 § 1 (part), 1999)

APPENDIX E-2

UNITED STATES CODE
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 103 — COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY

[Excerpts Only]

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances

owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release;

and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

§ 9614. Relationship to other law

(a) **Additional State liability or requirements with respect to release of substances within State**

Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of

hazardous substances within such State.

§ 9652. Effective dates; savings provisions

(d) Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants. The provisions of this chapter shall not be considered, interpreted, or construed in any way as reflecting a determination, in part or whole, of policy regarding the inapplicability of strict liability, or strict liability doctrines, to activities relating to hazardous substances, pollutants, or contaminants or other such activities.

§ 9659. Citizens suits

(h) Other rights

This chapter does not affect or otherwise impair the rights of any person under Federal, State, or common law, except with respect to the timing of review as provided in section 9613(h) of this title or as otherwise provided in section 9658 of this title (relating to actions under State law).

§ 9613. Civil proceedings

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

APPENDIX E-3

CALIFORNIA HEALTH AND SAFETY CODE DIVISION 20. MISCELLANEOUS HEALTH AND SAFETY PROVISIONS CHAPTER 6.8. HAZARDOUS SUBSTANCE ACCOUNTS

[Excerpts Only]

§ 25326. Release authorized or permitted pursuant to state law

"A release authorized or permitted pursuant to state law" means any release into the environment which is authorized by statute, ordinance, regulation, or rule of any state, regional, or local agency or government or by any specific permit, license, or similar authorization from such an agency, including one of the foregoing, that recognizes a standard industry practice, including variances obtained from the agency which allow operations for facilities during a period of time when releases from the facilities do not conform with relevant statutes, ordinances, regulations, or rules. The term includes a federally permitted release, as defined by Section 25325, and releases that are in accordance with any court order or consent decree.

§ 25366. Construction of chapter

(c) Except as provided in Sections 25360, 25361, 25362, and 25363, nothing in this chapter shall affect or modify in any way the obligations or

liability of any person under any other provision of state or federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of the hazardous substance.

Supreme Court, U.S.
FILED
MAR 7 2003
OFFICE OF THE CLERK

No. 02-1169

In The
Supreme Court of the United States

CITY OF LODI, CALIFORNIA,

Petitioner,

v.

FIREMAN'S FUND INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Petition for Certiorari misstates the questions that would be presented if the Court were to grant certiorari. The case was dismissed by the district court on a Federal Rule of Civil Procedure 12(b)(6) motion filed by the defendant and petitioner, City of Lodi ("Lodi"). Thus, the allegations of the Complaint provide the factual basis for the issues on appeal. If the Court were to grant certiorari, the questions presented would be:

(1) Does the *Comprehensive Environmental Response, Compensation, and Liability Act*, 42 U.S.C. §9601 *et seq.* ("CERCLA") preempt specific provisions of Lodi's "*Comprehensive Municipal Environmental Response and Liability Ordinance*" (MERLO), a municipal ordinance passed by a city alleged to be jointly and severally liable under CERCLA for response costs, that conflict with CERCLA provisions governing the allocation of liability for response costs among that city and other potentially responsible parties?

(2) Does CERCLA preempt specific MERLO provisions that conflict with CERCLA provisions governing the recovery of litigation costs by a city that is alleged to be jointly and severally liable under CERCLA for response costs?

CORPORATE DISCLOSURE STATEMENT

Respondent Fireman's Fund Insurance Company is a wholly-owned subsidiary of Allianz Insurance Company, which is a wholly-owned subsidiary of Allianz of America, Inc., which in turn is a wholly-owned subsidiary of Allianz A.G., a German corporation. With the exception of Allianz Insurance Company, no publicly held company owns ten percent or more of Fireman's Fund Insurance Company stock.

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STATEMENT OF THE CASE[1]

A. Factual Background

1. The Lodi Groundwater Site

As alleged in the Complaint below, beginning in April 1989, Lodi detected tetrachloroethane (also known as perchloroethene or "PCE") in its groundwater. Shortly thereafter, the Central Valley California Regional Water Quality Control Board (the "Board") began investigating groundwater contamination in Lodi. The Board issued a report of its findings in 1992. Its report revealed that Lodi bore significant responsibility for the contamination. Lodi's sewers, which leaked due to poor construction and maintenance, were a principal conduit for contamination.

In 1995, the California State Department of Toxic Substances Control ("DTSC") directed an expanded investigation to identify the extent of and additional sources of groundwater contamination in Lodi. DTSC is a state agency charged with enforcement of the California Hazardous Substance Account Act, California Health & Safety Code §25300 *et seq.* ("HSAA"), the state's analog to

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[1] Since this case was decided on a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, the "facts" are those contained in Fireman's Fund's Complaint. Therefore, the "facts" in Lodi's Petition for Writ of Certiorari, many of which differ from those contained in Fireman's Fund's Complaint, were not considered by the lower courts, are not part of the record in this case, and can provide no basis for certiorari review. *Compare* Pet. 13-15 *with* Complaint, Excerpt from Record on Appeal at 001-027. Many of these "facts," such as the absence of the Lodi cite on the federal NPL, are irrelevant. Others, such as the claim that the Cooperative Agreement bars "the state" from asserting CERCLA claims, are contested.

CERCLA. The DTSC investigation confirmed that the Lodi sewers were a major source of groundwater contamination.

2. Lodi Retains Special Counsel

Facing significant liability for its groundwater contamination, by January 1997, Lodi had retained a private law firm for a fee of $65,000.00 per month to advise it. The law firm was hired "to go after insurance money." *See* Complaint at 5, Excerpt from Record on Appeal at 006. It was expected that the firm's monthly fee "would be repaid as the law firm secures settlements from insurance companies providing coverage for businesses responsible for the pollution." *Id.* In effect, as the Ninth Circuit noted, "Lodi has expended significant attorney's fees in an attempt to escape liability through the enactment and defense of its municipal ordinance. These efforts, so far as we can tell, have not advanced the cleanup of the Lodi Site." *See Fireman's Fund Ins. Co. v. City of Lodi, et al.*, 302 F. 3d 928, 953 (9th Cir. 2002).

3. Lodi Settles With DTSC

DTSC negotiated with Lodi and three other potentially responsible parties to try to effect a cleanup of the Lodi groundwater site. In May 1997, Lodi settled with DTSC by agreeing to pay DTSC just over $1 million. Lodi also undertook either to compel other responsible parties to cleanup the site or to cleanup the entire site itself. The settlement was reported to be "part of a high-stakes strategy in which the city is going after insurance companies to pay for the pollution cleanup." *See* Complaint at 7-8, Excerpt from Record on Appeal at 008-009.

4. Lodi Enacts An Environmental Law

On August 6, 1997, the Lodi City Council adopted the "Comprehensive Municipal Environmental Response and Liability Ordinance," No. 1650 ("MERLO").[2] Lodi modeled MERLO on CERCLA and California's HSAA, but modified their terms in crucial ways to expand Lodi's authority and reduce its liability. MERLO was designed to shift all the costs of cleanup for which Lodi is responsible under CERCLA to other parties. In doing so it conflicts with CERCLA. For example, MERLO:

1. allows Lodi, and only Lodi, even though it is itself liable for response costs under CERCLA, to impose joint and several liability for *all* response costs, including its own, on other responsible parties, contrary to CERCLA;

2. forbids apportionment of liability (for example, back to Lodi) unless the responsible party meets a higher burden of proof than the burden of proof provided by CERCLA for the same purpose;

3. makes no provision whatever for contribution claims against the City, unlike CERCLA §113(f), 42 U.S.C. §9613(f);

---

[2] On November 17, 1999, Lodi's City Council repealed Ordinance No. 1650 and enacted Ordinance No. 1684. The ordinances are substantially similar. As the Ninth Circuit held, "the controversy between the Insurers and Lodi is still 'live' and [] the repeal and reenactment of MERLO did not moot the Insurers' claims at issue in this appeal." *See Fireman's Fund*, 302 F. 3d at 936 n.8. The Ninth Circuit also stated that it "must decide the issues raised in these related appeals on the current version of MERLO," and, thus, applied the most recent version of MERLO because it was "the law in effect at the time of decision." *See id.*

4. permits Lodi to order remediation more stringent than the NCP, contrary to CERCLA;

5. allows Lodi to recover any attorney's fees and "abatement action costs" it incurs in cleaning up contamination, contrary to CERCLA. (This provision is designed not only to recover the City's excessive attorney's fees, which were already $8 million in 1999 and are recently reported to have grown to $16.7 million, but also the usurious arrangement to finance these fees arranged by an investment bank at the City's expense).

In sum, MERLO conflicts with federal law because it is part of an elaborate scheme to shift Lodi's CERCLA liability onto others.

B. Procedural Background

1. District Court Proceedings

On August 6, 1998, Fireman's Fund filed a complaint (the "Complaint") against Lodi and several individual defendants in the United States District Court for the Eastern District of California (the "District Court"). The Complaint alleged six claims for relief, based on CERCLA's and HSAA's preemption of MERLO and violations of the United States and California Constitutions, based on a denial of procedural and substantive due process, equal protection and contract clause rights. The Complaint sought a declaration that MERLO is invalid and requested injunctive relief against its further enforcement.

On February 25, 1999, the District Court issued its opinion on Lodi's motion under Federal Rule of Civil Procedure 12(b)(6) to dismiss the Complaint. The District Court ruled that Fireman's Fund had not stated a claim for CERCLA preemption and, *sua sponte*, the district court

abstained from deciding Fireman's Fund's remaining constitutional claims. Thus, the District Court did not consider many claims in the Complaint, which included claims that MERLO: (1) violated Article II, Section 7 of the California State Constitution; (2) violated Fireman's Fund's procedural due process rights under the Fourteenth Amendment; (3) violated Fireman's Fund's substantive due process rights under the Fourteenth Amendment and Article I, Section 7 of the California State Constitution; (4) impaired Fireman's Fund's right to contract under Article I, Section 10, Clause I of the U.S. Constitution and Article I, Section 9 of the California State Constitution; and (5) denied Fireman's Fund equal protection under the Fourteenth Amendment and Article I, Section 7 of the California State Constitution.

2. The Ninth Circuit Court Of Appeals' Decision

Fireman's Fund filed its appeal of the District Court's ruling on June 11, 1999. On October 8, 2002, the Ninth Circuit Court of Appeals ("Ninth Circuit") issued its final decision on the appeal.[3] With regard to Fireman's Fund's preemption claims, the Ninth Circuit agreed with Lodi, that CERCLA and HSAA do not preempt the field of hazardous substance remediation, and that municipalities have some power to legislate in this area. *See Fireman's Fund*, 302 F. 3d at 943, 956. The Ninth Circuit held, however, that "CERCLA permits both states and their political subdivisions to enact hazardous waste regulations

[3] As a result of two petitions for rehearing, the Ninth Circuit issued two prior opinions in this matter. Its opinion of October 30, 2001 was withdrawn on April 17, 2002. A new opinion was issued on August 6, 2002, which was modified on October 8, 2002.

and pursue additional remedies, *as long as those remedies do not conflict or interfere with 'the accomplishment and execution of [CERCLA's] full purpose and objective. . . .'"* *See id.* at 943 (*quoting Indus. Truck Ass'n, Inc. v. Henry*, 125 F. 3d 1305, 1309 (9th Cir. 1997)) (emphasis added).

The Ninth Circuit held that three of MERLO's provisions are preempted by CERCLA or California state law, and that several others may be preempted if, upon remand, the District Court determines that Lodi is a potentially responsible party ("PRP") under CERCLA.

a. Preempted Provisions

Stating that Lodi "cannot foist its share of liability onto others by imposing on fellow PRPs a higher burden of proof for apportionment," the Ninth Circuit found that MERLO's provision imposing a higher burden of proof on entities that seek to apportion liability for cleanup costs "is preempted because it stands as 'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *See id.* at 947 (*quoting California Fed. Sav. & Loan Ass'n, et al. v. Guerra, et al.*, 479 U.S. 272, 281 (1987)). "[F]or the same reasons that MERLO's burden of proof is preempted," the Ninth Circuit found MERLO's provision that allows Lodi to require remediation procedures that are more stringent than the NCP to be preempted by CERCLA. *See id.* at 951.

b. Conditionally Preempted Provisions

In addition, the Ninth Circuit determined that MERLO's provisions that allow "Lodi to impose joint and several liability on other PRPs and to recover attorneys'

fees may be preempted under the doctrine of conflict preemption if the district court finds that Lodi itself is a PRP. To the extent that MERLO protects Lodi from contribution claims by other PRPs, MERLO is also preempted if the district court finds that Lodi is a PRP." *See id.* at 956-57. Since it was plainly alleged that Lodi is a PRP, this qualified ruling favored Lodi.

With respect to MERLO's provision disallowing contribution claims, the Ninth Circuit found that "[i]f Lodi is indeed a PRP, it cannot simply legislate away this potential contribution liability under state and federal law." *See id.* at 946. Therefore, "MERLO is preempted to the extent that it legislatively insulates Lodi from contribution liability under state and federal law." *See id.* Similarly, MERLO's provision allowing Lodi to impose joint and several liability on other PRPs is preempted because if Lodi is a PRP, it "may not escape its share of responsibility by imposing all the costs of cleanup on others. Allowing it to do so would interfere with CERCLA's PRP cost allocation scheme. . . . " *See id.* at 947.

Regarding MERLO's provision that allows Lodi to recover the attorney's fees it incurs, the Ninth Circuit determined that this provision, too, is preempted if Lodi is a PRP:

> Litigation costs may indeed be a part of recovering funds that are needed to advance the cleanup. However, the ability to recover litigation-related attorney's fees does not necessarily advance the pace of cleanup because it may encourage ambitious litigation. We do not interpret the Cooperative Agreement to allow Lodi to recover its attorney's fees, nor do we necessarily believe that it could bestow on Lodi the right to

> recover all of its attorney's fees under the circumstances of this case.

Id. at 953-54.

Based on this ruling, the Ninth Circuit remanded the case for the District Court to determine whether Lodi is a PRP. *See id.* at 958. The District Court must also consider Fireman's Fund's five remaining constitutional claims.

On February 5, 2003, Lodi filed its Petition for Writ of Certiorari with this Court.

SUMMARY OF ARGUMENT

Lodi's Petition for Writ of Certiorari (the "Petition") is largely a merits brief, not a certiorari petition. It argues with passion that the Ninth Circuit's decision in *Fireman's Fund Ins. Co. v. City of Lodi, et al.*, 302 F. 3d 928 (9th Cir. 2002) (the "Ninth Circuit's decision") errs. The Petition, however, fails to explain why this Court should grant Certiorari to consider the alleged errors. The Court should not, for two obvious reasons.

First, this case is not ripe for Supreme Court review. The Ninth Circuit remanded the case for the District Court to determine whether Lodi is a PRP under CERCLA at the time that Lodi passed and sought to enforce the municipal environmental ordinance at issue in this case. In addition, five constitutional claims contained in Fireman's Fund's Complaint have not yet been considered by the District Court. The issues regarding CERCLA preemption addressed by the Ninth Circuit are better reviewed, if at all, after the District Court resolves these outstanding issues.

Second, the Petition fails to identify a significant federal question calling for review. Lodi asserts in a heading in its Petition that certiorari should be granted because the Ninth Circuit's decision decides important federal questions "in a way that conflicts with decisions of this Court, of other U.S. Courts of Appeal, and of the California Supreme Court." Petition ("Pet.") at 8. Yet, the text of the Petition fails to identify any such conflicts and simply reargues the merits of Lodi's case.

Accordingly, Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. THIS CASE IS NOT RIPE FOR REVIEW

The Ninth Circuit's decision remanded the case for the District Court to determine whether Lodi is a PRP under CERCLA. *See Fireman's Fund*, 302 F. 3d at 958. Depending upon the District Court's determination regarding the PRP issue, three of the questions presented by Lodi's Petition could be mooted: whether MERLO is preempted by CERCLA and HSAA because it (1) protects Lodi from contribution claims from other PRPS; (2) allows Lodi to impose joint and several liability; and (3) allows prevailing parties to recover their attorney's fees and other costs. *See* Pet. at ii. As a result, review by this Court of the issues raised in the Petition would be more informed after the District Court has made a determination of Lodi's status as a PRP under CERCLA.

Where the court of appeals remands a case for further proceedings, "it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen and Enginemen, et al.*

v. Bangor & Aroostook Railroad Co., et al., 389 U.S. 327, 328 (1967) (denying petition for writ of certiorari where court of appeals ruled on various legal issues and remanded case to district court for further consideration). This Court has previously stated its reluctance to exercise certiorari jurisdiction until final judgment has been reached in the lower courts. *Virginia Military Institute, et al. v. United States*, 508 U.S. 946 (1993) (denying petition for writ of certiorari where the court of appeals vacated the judgment that had been entered in favor of petitioners and remanded case to the district court for determination of an appropriate remedy).

Lodi's Petition is premature and should be denied.

II. THIS CASE DOES NOT MEET THE CRITERIA FOR CERTIORARI UNDER SUPREME COURT RULE 10

In its Petition, Lodi says that it will address the conflict between the Ninth Circuit's decision and the decisions of other federal and state courts after a "brief[ ] review [of] the law of preemption as well as the three complimentary statutory schemes that deal with the clean-up of hazardous waste sites at the federal, state, and local level, and that are relevant to this petition. . . . " Pet. at 8. The Petition, however, never provides the promised details that explain how the Ninth Circuit's opinion conflicts with any other federal or state court decisions. Nor could it. No such conflicts exist.

A. The Petition Fails To Identify An "Important Federal Question Decided In A Way That Conflicts With Relevant Decisions Of This Court"

Lodi does suggest at one point that the Ninth Circuit's decision conflicts with this Court's decision in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991) because it "misapplied *Mortier* and effectively federalized remedial environmental law by applying CERCLA to a non-CERCLA site." Pet. at 3. According to Lodi, the Ninth Circuit's decision "limited the application of CERCLA's savings clauses to the doctrine of 'field' preemption," thereby leaving "the Ninth Circuit free to essentially ignore CERCLA's savings clauses during its 'conflict' preemption analysis." Pet. at 4.

The suggestion of a conflict with *Mortier* is spurious. The Ninth Circuit's decision rejected the Fireman's Fund joint federal and state "field preemption" argument, agreeing with Lodi that a municipality can enact a local version of CERCLA, even one that largely duplicates the existing California state analog to CERCLA, the HSAA. The Ninth Circuit found that "*Mortier's* reasoning regarding FIFRA is equally applicable to CERCLA. Like FIFRA, CERCLA anticipates that states will enact supplemental remedial environmental legislation." *Fireman's Fund*, 302 F. 3d at 942. Accordingly, the Ninth Circuit held that "CERCLA and HSAA do not preempt the field of hazardous waste remediation, either explicitly or by implication." *Id.* at 956. While the Ninth Circuit found "that several sections of MERLO are preempted by state and federal law under the doctrine of conflict preemption . . . [w]e conclude that the balance of MERLO remains viable and is not preempted by either state or federal law." *Id.* at 957.

Lodi's perceived conflict between the Ninth Circuit decision and *Mortier* is based on a flawed understanding of preemption, an issue that the Ninth Circuit squarely addressed:

> Lodi's argument does not recognize the difference between field preemption and conflict preemption. We have indeed held that CERCLA's savings clauses make it clear that CERCLA does not preempt the *field* of hazardous waste cleanup. (citation omitted) As this opinion makes clear, municipalities such as Lodi may exercise significant powers of self-protection in regulating hazardous waste cleanup. However, the powers of municipalities are not unlimited. Where municipal legislation comes into conflict with CERCLA, we find the municipal legislation to be preempted, just as other circuits have found conflict preemption in other circumstances, notwithstanding the same savings clauses cited by Lodi.[4]

Id. at 952, n.26.

Contrary to Lodi's understanding, *Mortier* does not *absolutely* shield local ordinances from preemption. Thus, even if the field of hazardous substance cleanup is not preempted by CERCLA, specific provisions of a municipal ordinance, such as MERLO, may be preempted where they present "an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *Id.*, *quoting*

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[4] Moreover, the cases cited by the Ninth Circuit in its decision support the fact that its decision, far from conflicting with those of other circuit courts, follows the same reasoning. *See Fireman's Fund*, 302 F. 3d at 952, n.26.

Bedford Affiliates v. Sills, 156 F. 3d 416, 426-27 (2nd Cir. 1998).

Lodi won rather than lost the issue as to which *Mortier* was deemed the controlling precedent by the Ninth Circuit – the issue of whether a municipality could pass a local version of CERCLA and its California state analog, the HSAA. There is no conflict between the Ninth Circuit's decision and *Mortier*.

B. The Petition Fails To Show That The Decision Below Is "In Conflict With The Decision Of Another United States Court Of Appeals On The Same Important Matter"

The Petition's only mention of any conflict between the Ninth Circuit's decision and the decisions of any circuit court is limited to the conclusory heading on page 8 (stating that "[t]he Ninth Circuit's published opinion decided nationally important questions of federal law in a way that conflicts with decisions of this Court, of other U.S. Courts of Appeal, and of the California Supreme Court."). The remainder of the Petition fails to specify any conflicting decision.

Indeed, as the Ninth Circuit points out, its ruling that several provisions of MERLO are preempted by CERCLA is consistent with similar rulings from other circuit courts. *See, e.g., Fireman's Fund*, 302 F. 3d at 952, n.26; *see also Bedford Affiliates*, 156 F. 3d at 426-27 (finding that CERCLA preempts state common law restitution and indemnification actions); *In re Reading Co.*, 115 F. 3d 1111, 1117 (3rd Cir. 1997) (concluding that CERCLA preempts state common law restitution and contribution claims); *PMC, Inc. v. Sherwin Williams Co.*, 151 F. 3d 610, 617-18, 620

(7th Cir. 1998) (finding that CERCLA preempts parts of the Illinois Contribution Act). A discussion of the holdings in these cases is conspicuously absent from Lodi's Petition.

The only conceivable inconsistency with another circuit court decision suggested in the Petition is Lodi's argument accompanying the citation to *United States, et al. v. Akzo Coatings of America, Inc., et al.*, 949 F. 2d 1409 (6th Cir. 1991). Lodi contends that "only when CERCLA's response or liability scheme is properly invoked that CERCLA becomes applicable and acts to set a floor, not a ceiling, for environmental protection." Pet. at 26-27 (citing *Akzo*). Thus, Lodi appears to claim that the Ninth Circuit's holding that MERLO is preempted "only to the extent that [MERLO] permit[s] Lodi to order use of procedures more stringent than the NCP" conflicts with *Akzo*. *See Fireman's Fund*, 302 F. 3d at 952.

A review of *Akzo* reveals no conflict.

The Sixth Circuit underscored that it was not engaging in typical conflict preemption analysis: "We *eschew use of the word preemption* in this context. . . . " *See Akzo*, 949 F. 2d at 1458 (emphasis added). As *Akzo* explained:

> [T]he language of CERCLA and the legislative history of that act indicate that once the consent decree is entered by a federal court – giving the decree the force of law – alternative state remedies may not be pursued. *See* 42 U.S.C. §9621(f). At that point, other remedies based on state law are *in effect preempted by* the federal and state law embodied in *the decree* through a mechanism incorporating the federal standards and *any*

> *relevant more stringent state standards*. Because it is the terms of the consent decree, and not the language of CERCLA, which preempt alternative state remedies, *the use of the word preemption creates some confusion in this case.*

Id. at 1454-55 (emphasis added). Thus, in *Akzo*, the Sixth Circuit was addressing the statutory procedures provided by CERCLA for accommodating federal and state law in the process of establishing appropriate cleanup standards for a particular site. *See* 42 U.S.C. §9621(f)(2). This CERCLA statutory procedure is not at issue in *Fireman's Fund.* In sum, there is no conflict between the Sixth Circuit's holding in *Akzo* and the Ninth Circuit's holding in *Fireman's Fund.*

C. The Ninth Circuit's Decision Does Not Conflict With Any Decision of the California Supreme Court

The Petition states, again in the heading on page 8, that the Ninth Circuit's decision conflicts with a decision of the California Supreme Court. Again it fails to identify any conflicting California Supreme Court decision. Indeed, the only references to decisions of the California Supreme Court in the Petition appear in a discussion at pages 19-21, the substance of which is that the Ninth Circuit misinterpreted MERLO and its interaction with state law in making its preemption ruling. We think not, but assuming *arguendo* that Lodi is correct, that presents only a question of the interaction of municipal and state law, not an important question of federal law. This Court does not normally review municipal law questions on certiorari. At base, the Petition identifies no conflict between the Ninth

Circuit's decision and decisions of the California Supreme Court that justifies granting Lodi's Petition.

CONCLUSION

There is no reason for this Court to review this case. It is not ripe for review and presents no conflict with decisions of this Court, any circuit court, or any decision of the California Supreme Court. The Petition should be denied.

DATED: March 7, 2003

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Supreme Court, U.S.
FILED
MAR 10 2003
OFFICE OF THE CLERK

(3)

No. 02-1169

IN THE

Supreme Court of the United States

CITY OF LODI, CALIFORNIA,
Petitioner,

v.

FIREMAN'S FUND INSURANCE CO.,
UNIGARD INSURANCE CO., AND
UNIGARD SECURITY INSURANCE CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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21 pp

QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)—which expressly preserves State and local authority to "impos[e] any additional liability or requirements with respect to the release of hazardous substances" (42 U.S.C. § 9614(a))—preempts a municipal ordinance that authorizes the imposition of cleanup standards that are more protective than the federal National Contingency Plan.

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BRIEF OF THE NATIONAL LEAGUE OF CITIES AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE* [1]

The National League of Cities (NLC) is a non-profit organization whose members include 49 state municipal leagues and approximately 1,800 member cities and towns.

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk.

Through the member state municipal leagues, NLC also represents more than 18,000 municipalities. The International Municipal Lawyers Association (IMLA) is a non-profit organization that has served as an advocate for municipal attorneys since 1935. Its members include lawyers from more than 1,400 municipalities. IMLA serves as the legal voice for the nation's local governments and thus has a vital interest in legal issues that affect municipalities.

Municipalities, as the political subdivisions of the States, play a key role in our federal scheme. State and local officials "remain responsive to the local electorate's preferences * * * and remain accountable to the people." *New York v. United States*, 505 U.S. 144, 168 (1992). *Amici* have a strong interest in ensuring that, absent clear and manifest evidence of a contrary congressional intent as reflected in the text of federal legislation, municipalities retain their historic police powers to protect against serious threats to human health, public safety, and the environment. We respectfully urge this Court to review the Ninth Circuit's ruling that CERCLA preempts the more protective cleanup standards authorized by the City of Lodi's Comprehensive Municipal Environmental Response & Liability Ordinance ("MERLO").

PRELIMINARY STATEMENT

The Ninth Circuit's ruling in this case constitutes the rawest form of judicial policymaking under the guise of preemption analysis. It stands in direct contravention of this Court's precedents and congressional commands set forth in the text of the governing statute.

The court below held that municipalities are constitutionally prohibited by the Supremacy Clause from imposing cleanup standards for toxic waste spills more protective than those in the federal National Contingency Plan. Pet. App. 47a, 60a. It reached this sweeping conclusion notwith-

standing the express congressional directive in CERCLA that courts interpret that statute as preserving State and local authority to "impos[e] any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a). The Ninth Circuit similarly disregarded two other savings provisions making clear that CERCLA does not "affect or modify in any way" the obligations, liability, or rights established by state and local authorities for the cleanup of hazardous waste contamination. *Id.* §§ 9652(d), 9659(h).

To our knowledge, no other court has so ruled in CERCLA's twenty-year history. The analysis to support this unprecedented holding is contained in but a single sentence (Pet. App. 47a), which simply refers back to the court's conclusion that CERCLA preempts municipal requirements regarding the burden of proof that governs apportionment of liability among potentially responsible parties. Pet. App. 39a-43a. That analysis contains no discussion of the applicable statutory provisions regarding municipal prerogatives. Instead, it turns on the Ninth Circuit's policy judgment that more protective standards and procedures would foster "uncertainty." Pet. App. 42a.

Even more surprising, as discussed below, the Ninth Circuit's policy judgment is supported exclusively by reference to a series of recently issued reports on the cleanup of "brownfield" sites (Pet. App. 40a-42a), *i.e.*, lightly contaminated urban industrial sites often targeted for expeditious cleanup so the site can be returned to productive use. This reliance on brownfield policy is entirely inappropriate given the severe threat faced by the City of Lodi, a toxic contamination site described by the California Supreme Court as "an environmental public nuisance amounting to * * * a tremendous and serious groundwater contamination problem within Lodi's city limits." *Connecticut Indem. Co. v. Superior Court*, 3 P.3d 868, 873 (Cal. 2000) (internal quotes omitted).

More fundamentally, Congress's intent is the ultimate touchstone of every preemption case, and there is not a word in CERCLA to support the Ninth Circuit's conclusion that more protective standards are preempted. To be sure, CERCLA is designed to achieve cleanups that are both expeditious and fully protective of public safety, human health, and the environment. But once CERCLA's minimum requirements are met, the manner in which CERCLA's sometimes competing goals should be balanced is a policy call that Congress expressly left to the States and their political subdivisions, not to the courts. To hold that more stringent municipal cleanup standards for severe groundwater contamination are preempted due to the need for expeditious cleanup of lightly contaminated brownfield sites confirms the folly of judicial policymaking untethered by appropriate statutory constraints.

The Ninth Circuit correctly recognized that CERCLA's three savings provisions protect the authority of States *and* municipalities (as political subdivisions of the States), expressly rejecting Respondents' argument that these provisions extend only to the States themselves. Pet App. 24a-29a. Nevertheless, it ruled that CERCLA impliedly preempts more protective municipal cleanup standards because those standards, in the court's view, stand as an obstacle to CERCLA's purposes. In so ruling, the Ninth Circuit failed even to cite this Court's most recent pronouncement on the effect of savings provisions—*City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 122 S. Ct. 2226 (2002)—which relied on a very similar savings clause to reject a preemption challenge far stronger than the one raised here.

The Ninth Circuit not only ran roughshod over congressionally blessed local prerogatives, it did so with respect to a site that is not on the National Priorities List and has no continuing federal involvement, a site at which CERCLA is not being invoked by any person authorized by

Congress to do so, a site where the State has designated the City of Lodi as the lead enforcement authority to ensure adequate cleanup of its sole source of drinking water. The court below has, for the first time, stripped local officials of their authority, delegated from the States, to take into account unique local circumstances and concerns.

As a result of the ruling below, the roughly 52 million people that live in the nine States and two territories that comprise the Ninth Circuit no longer may rely on the authority and judgment of their local officials regarding the appropriate level of cleanup of toxic waste spills. As national organizations that represent local officials across the country, *amici* also are concerned about the severe chilling effect the ruling will have on local officials throughout the United States.

The Ninth Circuit's contravention of Congress's express commands, its disregard of this Court's precedents, and the national implications of the case all counsel strongly in favor of review by this Court.[2]

ARGUMENT

I. THE NINTH CIRCUIT'S RULING CONTRAVENES THIS COURT'S PREEMPTION PRECEDENTS AND CREATES A CIRCUIT SPLIT ON AN ISSUE OF NATIONAL IMPORTANCE.

This is an "obstacle" or "conflict" preemption case. The Ninth Circuit recognized (Pet. App. 3a) that CERCLA does not expressly preempt the provision of MERLO (§ 8.24.030(A)(5)) that authorizes more protective cleanup

[2] Given the overriding importance of the issue addressed in this brief, we give it our exclusive attention and express no view on the other questions presented by Lodi's petition for a writ of certiorari.

standards. Nor did Congress intend to occupy the field of hazardous waste site remediation. Pet. App. 24a-29a. The court's only basis for finding preemption is its judgment that more stringent local standards would constitute an obstacle to the accomplishment of the objectives of CERCLA. *Id.* at 47a.

The standards for finding obstacle preemption are well established. The Court starts with "'the assumption that the historic police powers of the States [a]re not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 541-42 (2001) (quoting *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A. Inc.*, 519 U.S. 316, 325 (1997)). This presumption against preemption is mandated by both "federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).[3]

The purpose of Congress is the "'ultimate touchstone' in every preemption case." *Id.* (quoting *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963)). Any conflict must be "irreconcilable. * * * The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute." *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982); *see also English v. General Electric Co.*, 496 U.S. 72, 90 (1990) ("The 'teaching of this Court's decisions * * * enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.'") (quoting *Huron Portland Cement Co. v. City*

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[3] It is "axiomatic that 'for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.'" *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (quoting *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)).

of Detroit, 362 U.S. 440, 446 (1960)). Conflict preemption "should be limited to state laws which impose prohibitions or obligations which are in direct contradiction to Congress' primary objectives, as conveyed with clarity in the federal legislation." *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

Whether local law constitutes a sufficient obstacle to federal law to require preemption "is a matter of judgment," *Crosby v. National Foreign Trade Council,* 530 U.S. 363, 373 (2000), but this judgment is to be made by "examining the federal statute as a whole and identifying its purpose and intended effects." *Id.* This judgment must also be made on a case-by-case basis. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (in a conflict preemption case, a court must examine whether state or local law "under the circumstances of th[e] particular case * * * stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

The opinion below represents a startling departure from these well-established principles. Despite the presumption against preemption and the need for case-by-case analysis, the Ninth Circuit did not even perform a separate preemption analysis regarding Lodi's more protective cleanup standards. Rather, the court simply found preemption "for the same reasons that MERLO's burden of proof is preempted." Pet. App. 47a.

That "same reason" in turn, boils down to a naked policy judgment by the court that more protective local standards are a bad idea:

> Lodi's requirement that a PRP prove by clear and convincing evidence that it caused a divisible portion of the harm is greater than the burden of proof required by CERCLA or HSAA, greater than that normally required in a civil case (preponderance of the evidence), and

> seems both inefficient and inequitable. If we were to approve Lodi's standard of proof, other California cities could follow, adopting hundreds of different liability schemes all more onerous than CERCLA. The risk of overly strict and uncertain liability would thereby be compounded, thwarting CERCLA's goals.

Pet. App. 42a.

The Ninth Circuit failed to cite a single word from CERCLA that suggests that Congress was concerned about "overly strict" or "uncertain" liability for polluters when it passed CERCLA.[4] Instead, the court relied entirely on recent policy reports and law journal articles regarding cleanup of lightly contaminated "brownfields."[5] Pet. App. 40a-42a. The court failed to acknowledge, however, that the Lodi Groundwater Site is not a brownfield and that ineffective cleanup also constitutes an obstacle to the purposes and goals of CERCLA. In any event, such freewheeling policy debates, divorced from statutory text, have no proper role in preemption analysis. Congress expressly left that policy call to the States and their political subdivisions, not to the courts.

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[4] The panel's only attempt to tie its analysis to the purposes of CERCLA is a citation to *Stanton Rd. Assocs. v. Lohrey Enters.*, 984 F.2d 1015, 1019 (9th Cir. 1993), for the proposition that "a fundamental purpose and objective of CERCLA is to encourage the timely cleanup of hazardous waste sites." Pet. App. 39a. There is no allegation that Lodi has failed to act promptly in responding to the Lodi Groundwater Site, and *Stanton* provides no support for the proposition that Congress viewed local standards like Lodi's as an obstacle to the accomplishment of CERCLA's purposes.

[5] Unlike the serious contamination faced by Lodi, "brownfields" are lightly contaminated sites that are often targeted for expeditious cleanup to return them to productive use. *E.g.*, S. Rep. No. 107-2 at 2 (2001).

This Court in *Mortier* pointedly rejected a remarkably similar policy argument asserted as the basis for preemption of local regulations. Responding to Mortier's argument that permitting local pesticide regulations "rais[ed] the specter of gypsy moth hordes safely navigating through thousands of contradictory and ineffective municipal regulations," this Court responded: "Congress is free to find that local legislation does wreak such havoc and enact regulation with the purpose of preventing it. We are satisfied, however, that Congress has not done so yet." *Mortier,* 501 U.S. at 615-16.

As noted above, the intent of Congress is the "ultimate touchstone" in a preemption case. Government reports and law journal articles published decades after a statute was passed have never been used by this Court, or any other court to our knowledge, as the sole basis for finding preemption.

Because the Ninth Circuit departed so dramatically from applicable precedent, it comes as no surprise that other courts have reached diametrically opposed conclusions. For example, the United States Court of Appeals for the Sixth Circuit, in language that could not be clearer, has concluded that "more stringent environmental standards are not preempted by CERCLA." *United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1454 (6th Cir. 1991). The *Akzo* court emphatically insisted that "CERCLA sets only a floor, not a ceiling, for environmental protection." *Id.* While recognizing that a consent decree entered by a federal court under CERCLA assumes the force of law and thus precludes alternative state remedies (*id.* at 1455), the Sixth Circuit concluded that "CERCLA does not preempt state environmental [requirements] which set higher cleanup standards than the federal statute." *Id.* at 1458. The Ninth

Circuit's ruling to the contrary in the case at bar thus creates a circuit split on an issue of national importance.[6]

II. CONGRESS CAREFULLY PRESERVED AN INDEPENDENT ROLE FOR LOCAL GOVERNMENTS IN REMEDIATING HAZARDOUS WASTE SITES.

A. CERCLA's Savings Clauses Expressly Preserve the Right of Local Governments to Impose "Any Additional Liability or Requirements."

CERCLA does not contain an express preemption provision. To the contrary, it has three separate savings provisions. First, and most importantly, Section 114(a) specifically preserves the ability of States to "impos[e] any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a). Although this provision refers only to "State[s]," following this Court's ruling in *Mortier*, the Ninth Circuit

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[6] The Ninth Circuit (Pet. App. 50a n.26) cites three cases as examples of conflict preemption under CERCLA, but they are readily distinguishable and in fact support Lodi's position. Each concerns contribution actions and holds only that Section 113(f) preempts state statutory and common law claims for contribution because these claims would undermine CERCLA's "elaborate settlement scheme." *In re Reading Co.*, 115 F.3d 1111, 1117 (3d Cir. 1997); *accord Bedford Affiliates v. Sills*, 156 F.3d 416, 427 (2d Cir. 1998); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610 (7th Cir. 1998). These cases provide no support for the Ninth Circuit's sweeping ruling that CERCLA preempts more protective cleanup standards adopted by any municipality, regardless of whether that municipality is a PRP seeking contribution from other PRPs. Moreover, as *Bedford* itself makes clear, CERCLA does not prevent the States or their political subdivisions "from enacting laws to supplement federal measures relating to the cleanup of such wastes." *Bedford Affiliates*, 156 F.3d at 427.

correctly ruled that "the term 'State' is broad enough to encompass political subdivisions." Pet. App. 26a.

Just last Term, this Court restated and reinforced its conclusion from *Mortier*, ruling in *Ours Garage* that "[a]bsent a clear statement to the contrary, Congress' reference to the 'regulatory authority of a state' should be read to preserve, not preempt, the traditional prerogative of the States to delegate their authority to their constituent parts." 122 S. Ct. at 2230. The Court preserved local regulation in *Ours Garage* even though the federal statute at issue expressly preempted regulations by "a State [or] political subdivision of a State" and then saved only "the safety regulatory authority of a State." *Id.* at 2232 (internal quotations omitted). In the case at bar, there is no express preemption; there is only a savings provision. Under *Ours Garage* and *Mortier*, Section 114(a) of CERCLA plainly prevents the conclusion that CERCLA preempts Lodi's more stringent cleanup requirements.

Sections 302(d) and 310(h) provide that CERCLA does not "affect or modify in any way" obligations, liability, or rights established by State and local authorities for the cleanup of hazardous waste contamination. 42 U.S.C. §§ 9652(d), 9659(h). As Senator George Mitchell, a key participant in the drafting of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), explained on the day President Reagan signed SARA into law:

> [Preemption] is an issue of great importance to many of us, and we have stated repeatedly in this bill that there is no preemption. Any other conclusion is wholly without foundation.

132 Cong. Rec. S17212 (Oct. 17, 1986); *accord* 132 Cong. Rec. S17136 (Oct. 17, 1986) (statement of Sen. Stafford) ("CERCLA, as enacted in 1980, contained only one arguably preemptive provision, which was section 114(c). SARA has repealed even that provision * * *.").

Under *Mortier*, as interpreted and applied in *Ours Garage*, these savings provisions are dispositive. Several factors make preemption even less appropriate here than it was in *Mortier*. First, CERCLA has not one, but three, savings clauses and contains many other statements indicating Congress's embrace of local remediation programs.

Second, the local pesticide regulations at issue in *Mortier* were "enacted independently of specific state or federal oversight." 501 U.S. at 615. In contrast, MERLO was passed by Lodi to comply with the specific terms of its cooperative agreement with California, which required Lodi to enact and enforce "a comprehensive municipal environmental response ordinance which shall enact into municipal law additional legal authorities to appropriately supplement the City of Lodi's already extensive environmental response authority * * *." Pet. App. 11a (quoting Section VI (A)(1) of the "Comprehensive Joint Cooperation Agreement" between California and Lodi).

Third, in *Mortier* the Court had to contend with a considerable amount of legislative history suggesting that Congress in FIFRA wanted localities "out of the picture." *Mortier*, 501 U.S. at 616-23 (Scalia, J., concurring in the judgment). Here, the available evidence suggests that Congress had no intent whatsoever to displace local hazardous waste cleanup requirements.

B. CERCLA Establishes a Regulatory Partnership Between Federal, State, and Local Governments that Belies Any Inference that Local Cleanup Standards Are Preempted.

In passing CERCLA, Congress's "objective [was] to protect the public health and environment against improper disposal of hazardous wastes." *Broward Gardens Tenants Ass'n v. United States*, 311 F.3d 1066, 1076 (11th Cir. 2002). To reach this objective, CERCLA expressly establishes a regu-

latory partnership between federal, state, and local governments that embraces local efforts that contribute to the cleanup of contaminated sites. *Cf. Mortier*, 501 U.S. at 615 (no conflict preemption in part because "FIFRA implies a regulatory partnership between federal, state, *and* local governments").

For example, CERCLA encourages local governments to respond aggressively to environmental harm caused by releases of hazardous substances. Section 106(a) specifies that any federal action taken to abate an imminent threat to health, welfare, or the environment shall be "[i]n addition to any other action taken by a State or local government." 42 U.S.C. § 9606(a). Section 107(d)(2) specifically exempts local governments from liability for "actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person." *Id.* § 9607(d)(2). Section 123(b)(1) provides for reimbursement to local governments for actions taken by local governments that are "necessary to prevent or mitigate injury to human health or the environment * * *." *Id.* § 9623(b)(1).

At federally funded cleanups, CERCLA also specifically authorizes the federal government to enter into cooperative agreements with local governments to "carry out actions authorized in this section." *Id.* § 9604(d)(1)(A). Under these cooperative agreements, CERCLA grants local governments broad authority to demand access to information, *id.* § 9604(e)(1) & (2), to gain entry to potentially contaminated sites, *id.* § 9604(e)(3), and to inspect and take samples at such sites. *Id.* § 9604(e)(4).

C. The National Contingency Plan Does Not Apply to the Lodi Groundwater Site.

The Ninth Circuit's conflict preemption analysis is premised upon the assumption that the Congress and the EPA intended the National Contingency Plan (NCP) to apply to sites such as the Lodi Groundwater Site. The panel concluded that MERLO is preempted to the extent it requires "abatement procedures more stringent than the NCP." Pet. App. 60a. This fundamental presumption by the Ninth Circuit is wrong.

The NCP sets mandatory standards only for federally funded response actions. 40 C.F.R. § 300.400(i)(2). Here, as Lodi explains in detail (Petition at 13-15), federal regulators have had almost no involvement. It is an uncontested fact that there has been no federally funded response action at the Lodi Groundwater Site. By its terms, the NCP is intended to provide only optional guidance for response actions taken by other parties. 40 C.F.R. § 300.400(i)(2) (NCP "may be used as guidance concerning methods and criteria for response actions by other parties under other funding mechanisms.").

It simply makes no sense to base conflict preemption on non-compliance with the NCP at a site where the EPA expressly deems compliance with the NCP to be optional.

D. The Ninth Circuit's Conclusion that CERCLA Preempts Only More Stringent Standards Turns Congressional Intent on Its Head.

Perhaps the most remarkable aspect of the Ninth Circuit's ruling is its conclusion that more stringent local government cleanup standards are preempted by CERCLA, but less stringent regulations are not. Pet. App. 47a-51a. The Ninth Circuit has turned CERCLA on its head.

CERCLA's primary objective is to ensure that hazardous waste sites are cleaned up sufficiently to protect human health and the environment. To achieve this objective at sites on the National Priorities List, Congress specifically required that remedies chosen by EPA achieve compliance with "any * * * state environmental or facility siting law that is more stringent than any Federal standard * * *." 42 U.S.C. § 9621(d)(2)(A)(ii). The NCP makes attainment of these State standards a "threshold" requirement of any remedial action selected by the EPA administrator. 40 C.F.R. § 300.430(f)(1)(i)(A).

As the Sixth Circuit has held, the *only* types of regulation plainly preempted by CERCLA are *less stringent* regulations that a State or local government may try to apply to federally funded cleanup actions. *Akzo Coatings*, 949 F.2d at 1455 ("Congress has neither expressly stated that CERCLA preempts state environmental regulation, (*beyond the obvious preemption of less stringent state standards*), nor enacted so comprehensive a statute that we may infer an intent to displace all supplementary state regulation.") (emphasis added). "CERCLA sets only a floor, not a ceiling, for environmental protection." *Id.* at 1454.

Thus, the Ninth Circuit's ruling that CERCLA sets a ceiling, not a floor, for environmental protection has no support in CERCLA and stands as further evidence that its preemption analysis is thoroughly misguided.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 10, 2003

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No. 02-1169

Supreme Court, U.S.
FILED
MAR 21 2003
CLERK

In the
Supreme Court of the United States

CITY OF LODI, CALIFORNIA
Petitioner,

v.

FIREMAN'S FUND INSURANCE CO.,
UNIGARD INSURANCE CO., AND
UNIGARD SECURITY INSURANCE CO.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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15 pp

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INTRODUCTION

The reported decision of the Ninth Circuit below, wholly contrary to the relationship carefully crafted[1] by Congress between CERCLA (the federal "Superfund Act")[2] and state law, this Court's preemption decisions, and the substantive decision of the Sixth Circuit on CERCLA's preemptive effect, has called into immediate and serious question the very validity of every state or local statute or common law addressing the protection of public health or the environment from risks posed by released hazardous substances that is not virtually identical to CERCLA. Turning more than two decades of established remedial environmental jurisprudence regarding released environmental hazardous substances nearly completely on its head, the Ninth Circuit's reported decision has erroneously and without any valid support in the statute or case law held:

1) The three very broad and explicit provisions of CERCLA, sections 114(a), 302(d), and 310(h), that set forth

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[1] Petitioner, City of Lodi, California, recognizes that, since its original enactment, CERCLA has met with widespread judicial accord that many of its provisions could me more clearly drafted and better synchronized with other statutes. (*See e.g., Aviall Services, Inc. v. Cooper Industries, Inc.*, 312 F.3d 677, 684 (5th Cir. 2002) ("CERCLA is notorious for vaguely drafted provisions and an inconclusive, if not contradictory, legislative history.").) However, the precise language used in and the clear interrelationship among the three separate savings clauses set forth in CERCLA make them a rather rare example of congressional clarity however difficult may be their application in a given case.

[2] Comprehensive Environmental Response, Compensation & Liability Act of 1980 ("CERCLA"), as amended by the Super-fund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613, 42 U.S.C. §§ 9601-9675.

the very unique and virtually non-preemptive[3] effect Congress intended that statute to have on state law, relate only to "field preemption" and not to "conflict preemption."

2) CERCLA's liability scheme preempts the provisions of a state or local statute or common law environmental remedial liability scheme in a action brought under such a state law and concerning a site at which CERCLA's liability scheme set forth in §§ 106 and 107 (42 U.S.C. §§ 9606 and 9607) has not, despite more than a decade of notice to appro-priate federal and state official regarding conditions at the site, been invoked by anyone authorized by congress to do so.

3) Notwithstanding the clear congressional command in CERCLA § 114(a), 42 U.S.C. § 9614(a), that CERCLA not be construed or interpreted to preempt any state (and presumably its political subdivisions as authorized by state law) from imposing additional liability with respect to released hazardous substances, that the provisions of the remedial environmental municipal ordinance at issue herein that allow for the imposition of more stringent (*i.e.*, more protective of human health or the environment) are preempted by CERCLA.

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[3] CERCLA § 114(a), 42 U.S.C. § 9614(a), provides that CERCLA shall not be construed or interpreted as preempting any state (and by implication, their political subdivisions as authorized by state law) from imposing any ***additional*** liability or requirements respecting released hazardous substances. CERCLA § 302(d), 42 U.S.C. § 9652(d), provides that CERCLA shall ***not affect or modify in any way*** the obligations or liabilities of any person under state law, including common law, regarding released hazardous substances. CERCLA § 310(h), 42 U.S.C. § 9659(h), provides that, except as to two matters that are irrelevant here, nothing in CERCLA affects or otherwise impairs the rights of any person under federal, state or common law.

In this case, several insurers have challenged the validity of the Municipal Environmental Response & Liability Ordinance or MERLO (Lodi Mun. Code §§ 8.24.010-8.24.090), an ordinance enacted by the City of Lodi to assist Lodi in responding to "an environmental public nuisance amounting to . . . a tremendous and serious groundwater contamination problem within Lodi's city limits." (*Connecticut Indemnity Co. v. Superior Court,* 23 Cal. 4th 807, 814 (2000) (internal quotation marks omitted).)

Three of MERLO's provisions are at issue here. First, MERLO § 8.24.040(E), very similar to the federal and state "Superfund Acts,"[4] allows Lodi to hold responsible parties jointly and severally liable for an entire indivisible environmental harm, reduced by Lodi's share of liability, if any, for such harm. (Those responsible parties are, in turn, free to assert, against anyone they wish, including Lodi, contribution claims to equitably apportion their joint and several liability pursuant to state or any other applicable law.) Second, MERLO § 8.24.040(F), as authorized by state law,[5] allows prevailing parties to recover their attorney's fees in proceedings pursuant to MERLO. Third, MERLO § 8.24.030(A)(5) allows Lodi to impose more stringent (*i.e.,* more protective of public health or the environment) clean-up requirements than would be required for consistency with the National Oil and Hazardous Substance Pollution Contingency Plan ("NCP") (40 C.F.R. Part 300) in an action under CERCLA.

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[4] *See e.g.,* Carpenter-Presley-Tanner Hazardous Substance Account Act (HSAA) Cal. Health & Saf. Code §§ 25300-25395.15.

[5] California Government Code § 38773.5(b) authorizes cities to provide for the recovery of attorney's fees by prevailing parties in actions to abate nuisances.

The Ninth Circuit held that those aspects of MERLO conflict with and are preempted by CERCLA. It held, in effect, that a municipal law cannot confer upon a municipality any benefit or litigation advantage that would not be available to it in an action under CERCLA because such laws stand as obstacles to the purposes of CERCLA. (*See Fireman's Fund Insurance Co. v. City of Lodi,* 302 F.3d 928, 946-53 (9th Cir. 2002).) The Ninth Circuit's decision is a startling departure from long-standing and well-accepted preemption jurisprudence given CERCLA's savings clauses, and given that the Lodi site has no continuing federal involvement, is not on the National Priorities List, and is a site at which CERCLA has not been invoked. (*See* Lodi Pet. for Writ of Cert., Feb. 5, 2003 ("Pet."), at pp.13-16.) Because the Ninth Circuit effectively gutted MERLO by invalidating its most important provisions, Lodi seeks this Court's review of the Ninth Circuit's decision.

ARGUMENT

I. MERLO does not and could not shield Lodi from liability or shift Lodi's liability, if any, onto others.

In its opposition, Fireman's Fund attempts yet again to divert attention from its self-serving campaign to delay and impede Lodi's efforts to secure and apply the proceeds of the liability insurance policies it issued to responsible parties at this site to the investigation and clean-up of the site by parading out its oft-repeated mischaracterization of "MERLO . . . [as] an elaborate scheme to shift Lodi's CERCLA liability onto others." (Fireman's Fund Brief in Opp. to Pet. for Writ of Cert., Mar. 7, 2003 ("Opp."), at pp. 4, 3.)

That is, of course, nonsense. MERLO does not shield, cannot shield, and has never been construed or argued by Lodi, its lawyers, or anyone else charged with its enforcement, to shield Lodi from liability it rightfully bears,

or to shift Lodi's liability, if any, under any applicable law onto others. On the contrary, anyone held jointly and severally liable pursuant to MERLO is absolutely free to assert contribution claims against Lodi, and MERLO, as local legislation, cannot shield Lodi from such claims. (*See* Pet. at pp. 16-19.) Thus, if Lodi is ultimately not held liable, based on CERCLA or any other federal or state law, for the contamination at the Lodi site, it will ***not*** be because of MERLO.

II. This case is ripe for Supreme Court review.

In its opposition, Fireman's Fund argues that Lodi's petition is premature and that this matter is not yet ripe for Supreme Court review since several issues presented by the petition could be mooted if, on remand, the District Court determines that Lodi is not a "PRP" (*i.e.*, a responsible party) under CERCLA. (*See* Opp. at pp. 9-10.)

However, this case is very ripe for Supreme Court review. First, as a matter of appellate jurisdiction, "[t]he Supreme Court has unquestioned jurisdiction to review interlocutory judgments of federal courts of appeals and other federal courts whose judgments are reviewable pursuant to [28 U.S.C.] § 1254(1). Invocation of such jurisdiction . . . is not conditioned on the finality of the judgment or order in question." (Robert L. Stern, *et al., Supreme Court Practice,* at § 4.18, p.195 (7th ed. 1993).) For example, "[c]ertiorari was . . . issued to review a non-final judgment where there was a conflict on a question of law with another court of appeals or a highest state court, a conflict which would justify review of a final decree or judgment." (*Id.*, at § 4.18, p.197 (citing cases).) More to the point, certiorari has also been issued in numerous non-final preemption cases. (*See e.g., International Paper Co. v. Ouellette,* 479 U.S. 481 (1987); *Medtronic, Inc. v. Lohr,* 518 U.S. 470 (1996); *Buckman Co.*

v. Plaintiff's Legal Comm., 531 U.S. 341 (2001); *Pegram v. Herrich,* 530 U.S. 211 (2000); *Freightliner Corp v. Myrick,* 514 U.S. 280 (1995); *Gade v. National Solid Wastes Mgmt. Assoc.*, 505 U.S. 88 (1992).)

Second, the only reason the Ninth Circuit remanded this matter to the District Court to determine whether Lodi is a "PRP" was because of its ruling that, if Lodi is a "PRP" under CERCLA (even though there is no CERCLA action pending at this site), then Lodi cannot impose joint and several liability under state or municipal law on, or recover attorney's fees under state or municipal law from, other responsible parties in a state law public nuisance abatement action. (*Fireman's Fund,* 302 F.3d at 945-47, 952-54.) As such, if this Court grants certiorari and reverses the Ninth Circuit's decision, then there will be no need for the remand, and the District Court, Lodi, the insurers herein, and the over 100 parties involved in a related case before the same District Judge (hearing ***only*** state law claims on supplemental jurisdiction) can all avoid the substantial time, effort and expense of litigating a claim that no one has even asserted against Lodi. Thus, it would make no sense to deny certiorari in order to allow that (nonexistent) claim to be litigated. On the contrary, certiorari should be granted so that, if the Court sustains Lodi's position, litigation of that claim can be avoided and the court-ordered clean-up of this site can commence.

Third, because the parties disagree on what the Ninth Circuit meant by the term "PRP," it is not even clear what issue the Ninth Circuit remanded to the District Court. Lodi contends that "PRP" must mean "responsible party" and thus that the issue on remand must be whether Lodi would be a ***responsible*** party under CERCLA were there an action to impose direct liability under CERCLA. The insurers and other parties, however, interpret "PRP" to mean "potentially responsible party" and thus the issue to them is whether Lodi

is a ***potentially*** responsible party under CERCLA. As such, the parties are all about to embark upon an incredibly time-consuming and expensive endeavor that could turn out to be a monumental waste of time if this Court or the Ninth Circuit later determines that the District Court misinterpreted the Ninth Circuit's use of the undefined term "PRP."

Fourth, even if the Court were to deny certiorari and the District Court were to find that Lodi is not a "PRP" (whatever that term turns out to mean), the Ninth Circuit's decision is still published and it will still continue to have a profound adverse impact on state or local governments that wish to respond to environmental contamination and to exercise their police powers to protect public health, welfare, and the environment without invoking CERCLA. If the state or local statutes or common law differ from CERCLA's liability scheme, they are already victims of the Ninth Circuit's reported decision. Such state and local governments will be forced to incur the delay and expense of addressing wholly irrelevant "preemption issues" relating to differences between CERCLA and the state or local law at issue. This is precisely the opposite effect Congress intended for CERCLA to have on state and local law.

III. This case meets the criteria for certiorari under Supreme Court Rule 10.

Finally, Fireman's Fund also argues in its opposition brief that this case does not meet the criteria for certiorari because, in its opinion, the Ninth Circuit's decision does not involve an important question of federal law and does not conflict with decisions of this Court, of other circuit courts, or of the California Supreme Court. (*See* Opp. at 10-16.)

However, contrary to Fireman's Fund's assertion, this case does indeed involve an immensely important question of federal law (*i.e.*, whether CERCLA preempts state or local

laws that confer some benefit or litigation advantage to litigants that would not be available to them in an action under CERCLA). Similarly, the Ninth Circuit's resolution of that issue (*i.e.*, that CERCLA preempts such laws) does indeed conflict with decisions of this Court, of other Circuit Courts of Appeal, and of the California Supreme Court.

The Ninth Circuit's decision conflicts with *United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409 (6th Cir. 1991) and thereby creates a circuit split between the Ninth and the Sixth Circuits. The Sixth Circuit concluded in *Akzo Coatings* that CERCLA only preempts ***less protective*** clean-up requirements that a state or local government may try to apply to federally funded clean-up actions. (*Akzo*, 949 F.2d at 1454-55 ("Congress has neither expressly stated that CERCLA preempts state environmental regulation, (beyond the obvious preemption of less stringent state standards), nor enacted so comprehensive a statute that we may infer an intent to displace all supplementary state regulation.").) As the Sixth Circuit put it, "CERCLA sets only a floor, not a ceiling, for environmental protection." (*Akzo*, 949 F.2d at 1454.) Thus, the Ninth Circuit's contrary decision that CERCLA only preempts ***more protective*** clean-up requirements (even when CERCLA has not been invoked) stands in diametric opposition to the Sixth Circuit's holding in *Akzo Coatings* and thereby creates a conflict between the Ninth and the Sixth Circuits.

The Ninth Circuit's decision also conflicts with the California Supreme Court's decision in *American Motorcycle Association v. Superior Court*, 20 Cal. 3d 578 (1978) and its progeny. In *American Motorcycle*, the California Supreme Court held that, under California's comparative responsibility system, a plaintiff's contributory liability for his own indivisible injury does ***not*** bar him from imposing joint and several liability on two or more persons who cause or

contribute to a single indivisible injury; however, joint and several liability is reduced by the plaintiff's share of liability. (*Id.*, at 586-90.) That holding has long governed the statutory and common laws of public nuisance abatement in California and has allowed for the timely implementation of injunctive abatement orders necessary to protect the public or abate public nuisances in California, even where it is alleged that the governmental plaintiff is also liable. Now, that conflicts with the Ninth Circuit's decision that liable parties cannot impose joint and several liability on others for indivisible injury respecting released hazardous substances if they could not do so under CERCLA (even when, as here, CERCLA has not been invoked). (*Fireman's Fund,* 302 F.3d at 945-47.)

The Ninth Circuit, however, asserts that its decision is consistent with rulings from other circuits: "Where municipal legislation comes into conflict with CERCLA, we find the municipal legislation to be preempted, just as other circuits have found conflict preemption in other circumstances, notwithstanding the same savings clauses cited by Lodi." (*Id.*, at 952, n.26 (*citing Bedford Affiliates v. Sills,* 156 F.3d 416, 426-27 (2d Cir. 1998); *In re Reading Co.,* 115 F.3d 1111, 1117 (3d Cir. 1997); *PMC, Inc. v. Sherwin Williams Co.,* 151 F.3d 610, 617-18, 620 (7th Cir. 1998)).)

Those cases, however, are readily distinguishable from this case and, in fact, Lodi has absolutely no disagreement with their holdings (although, in some cases, the basis thereof could have been more accurately stated). In those cases, the Second, Third, and Seventh Circuits stopped a party's attempt to invoke state statutory or common law remedies as an end-run around a particular requirement of CERCLA ***in a CERCLA action***. (*Bedford,* 156 F.3d at 426-27; *Reading,* 115 F.3d at 1117; *PMC,* 151 F.3d at 618.) Those cases are not really "preemption" cases, but rather involve the exclusivity of the remedies available under the liability

scheme set forth in CERCLA §§ 106, 107 and 113. (Namely, CERCLA's contribution provision, § 113, is the ***sole*** method intended by Congress to be available to apportion among responsible parties liability imposed pursuant to CERCLA's direct liability provisions, §§ 106 and 107. State law contribution schemes may not be used to bypass the conditions and requirements set forth in § 113 when attempting to apportion liability imposed pursuant to CERCLA.) In contrast, in the present action, CERCLA's liability scheme has not been triggered and Lodi is not seeking to use MERLO to end-run around the requirements of CERCLA in a CERCLA action.

CONCLUSION

For the foregoing reasons, the City of Lodi requests that this Court grant its petition for writ of certiorari.

Respectfully submitted,

March 20, 2003

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